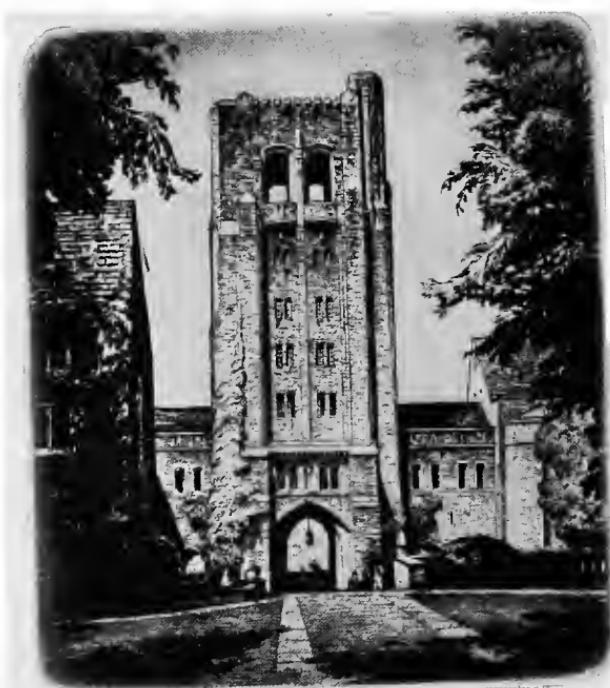


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THE DOCTRINES  
OF THE  
LAW OF CONTRACTS,  
IN  
THEIR PRINCIPAL OUTLINES,  
STATED, ILLUSTRATED, AND CONDENSED.

BY  
JOEL PRENTISS BISHOP.



ST. LOUIS:  
F. H. THOMAS AND COMPANY.  
1878.

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## PREFACE.

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This book is the outgrowth of a plan to collect, in simple and compact language, and arrange in an order of my own, the essential doctrines of the law of contracts; referring mainly to the larger books, which the reader was expected to consult as he had occasion, for illustrations and the adjudged cases. But on proceeding to do what I had thus undertaken, I found the plan impossible with me, though doubtless it would not be with an author of greater ability. When I felt, in those books, for the ribs in the body of the law of contracts, and for the spinal column, I could not distinguish rib or backbone from muscle.

Should I abandon altogether what I meant? That I would not do. So I have travelled through the adjudged cases, collected the leading doctrines, and arranged from them what I deemed to be a skeleton of the law of the subject, put with it so much of flesh in the form of illustrations as seemed imperative, and draped the whole with as thin a gauze of needless words as I deemed the public taste would bear. My object has been to present the body of the law of contracts, without its bloat, in form to be examined and reexamined, by old and young, the learned and the unlearned, — the student, the practising lawyer, the

judge, the man of business, — as any skeleton is, by all classes of enquirers.

But why refer to so many cases? Because, first, the foot-notes are in nobody's way, — they do not injure the book for those who do not wish to use them. Secondly, those who have occasion to look beyond the general doctrines, which the text supplies, into their minuter forms, or to see further illustrations of them, have here the directions provided for ready use. Thirdly, practitioners who, in arguing before a court, desire to rely on a proposition in the book, have thus the means in hand for making the proposition good.

The references are mostly, but not exclusively, to our own American cases. In determining what ones and how many to make, I have not been guided by a general rule, but by the differing requirements of the several paragraphs. At one place, the authorities would be conflicting; hence many cases should be referred to, and they should be chiefly American. At another place, the sub-doctrines, under the general one in the text, would be numerous; therefore cases representing each minor form should be cited, — a proposition which I had not always the audacity to carry out in full, so multiplied were the citations which occasionally would have been necessary. At another place, the doctrine of the text would be a condensation from many authorities, no one of which sustained it alone, but all in combination did; therefore these must all be cited. Such are some of the varying reasons; but, where no special reason impelled, the citations have been sparse.

In conclusion, this small book is committed to all who are acquiring a knowledge of the law of contracts, or who have occasion to review what they already know, or to be referred to adjudications on the leading doctrines, not as containing the whole of what is known on the subject, but as condensing, into small space, in plain terms, and in a new order, what is most needful for all.

J. P. B.

CAMBRIDGE, MASS., January, 1878.



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## THE LAW OF CONTRACTS.

## CHAPTER I.

## THE ELEMENTS OF A CONTRACT.

**§ 1. Contract Defined.**—A contract is a promise from one to another, either made in fact or created by the law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration; and not being, from want of writing, or other lack of form, violative of any special rule of law governing the particular transaction. In actual affairs, the promise is often more complex; being made by or to more persons than one, or being mutual between two or more. But still, in essence and general idea, the contract remains the same.<sup>1</sup> More in detail,—

**§ 2. Kinds of Contract.**—A contract may be—

**Specialty.**—A specialty; that is, an instrument under seal.<sup>2</sup> Or,—

**Record.**—It may be by matter of record.<sup>3</sup> Or,—

**Parol.**—It may be a parol contract.

<sup>1</sup> I preferred to make the definition reasonably exact, rather than attempt impossible brevity. Our books have no standard definition of contract, approved by all. It is often defined, in form too short to be helpful, as “an agreement in which a party undertakes to do, or not to do, a particular thing.” Met. Con. 1 et seq. And see the other books on Contracts. My definition fails to notice the exception to the rule that generally a sealed instrument does not require a consideration. Post, § 23.

<sup>2</sup> Post, § 14 et seq.

<sup>3</sup> Post, § 39 et seq.

§ 3. **How Parol Contracts divided.** — Parol contracts are divided into —

**Written.** — Written contracts not under seal,<sup>1</sup> and —

**Oral.** — Contracts by mere spoken words.<sup>2</sup> But —

§ 4. **Explanation as to Parol.** — The term parol properly means by word of mouth;<sup>3</sup> and it is employed by legal writers to distinguish what is spoken from what is written, whether sealed or not. Thus, it is said that parol evidence is inadmissible to vary a contemporaneous writing.<sup>4</sup> Formerly there was no distinction, in legal effect, between a written contract not under seal and an oral one; and the term parol, as applied to either, was not misleading. Now there are many statutes requiring what might then have been done by word of mouth to be in writing; therefore, at this day, if a legal writer would avoid being misunderstood, he should generally designate what used to be termed a parol contract by the word "oral" or "written," as the fact in the particular instance may be.

Again, —

§ 5. **Implied.** — Sometimes a contract is implied where there is no direct proof of any, or, in fact, none has been made. The term "implied" is vague, and contracts under that name differ greatly. Of implied, —

**Created by Law.** — There are contracts, commonly termed implied, which, to speak more accurately, are created by the law to establish justice between the parties. They do not require mutual consent, but may even bind a party against his will.<sup>5</sup> Or, —

**Implied as of Fact.** — In other circumstances, the presumption, in the absence of rebutting proof, is that the

<sup>1</sup> Post, § 57 et seq.

<sup>2</sup> Post, § 47 et seq. See Met. Con. 3, 4.

<sup>3</sup> Toml. Law Dict. "Parol."

<sup>4</sup> 1 Greenl. Ev. § 275.

<sup>5</sup> Post, § 72 et seq.

parties really consented; and it is a good defence for one to show that, in fact, he did not consent. This contract, also, is termed implied.<sup>1</sup> Or,—

**Implied from Express.**—A contract may be implied by the law out of the terms of an express one, viewed in connection with the circumstances and the subject.<sup>2</sup>

**§ 6. Executory and Executed.**—These various contracts are contemplated as executory or executed, or as in part executory and in part executed.<sup>3</sup> Many consequences grow out of this distinction.

**§ 7. Parties.**—As one cannot sue himself,<sup>4</sup> or, consequently, enter into any obligation enforceable by law with himself, there must be two or more parties to every contract.<sup>5</sup> And, unless it is a contract which the law has created,—

**Of Sound Mind.**—A party, to be bound, must be of sufficiently sound mind to give the needful mental assent.<sup>6</sup> Also,—

**Of Adequate Age.**—He must be of such age as the law requires.<sup>7</sup> And—

**No Legal Disability.**—He must not be under any such legal disability as avoids the contract. A familiar but not the only illustration of this, is a married woman, where the common-law rules prevail.<sup>8</sup>

**§ 8. Minds in Accord.**—Except where the contract is created or implied by law, the minds of the parties must come into complete accord, the one consenting to exactly the same thing to which the other does.<sup>9</sup>

<sup>1</sup> Post, § 67 et seq.

<sup>2</sup> Post, § 95 et seq.

<sup>3</sup> Post, § 138 et seq.

<sup>4</sup> *Moffat v. Van Millingen*, 2 B. & P. 124, note.

<sup>5</sup> Post, § 250 et seq.

<sup>6</sup> Post, § 284 et seq., 197 et seq.

<sup>7</sup> Post, § 260 et seq.

<sup>8</sup> Post, § 281 et seq.

<sup>9</sup> Post, § 174 et seq.

§ 9. **Consideration.**—Except in contracts by specialty or by record, there must be, in connection with the promise, an adequate consideration for it, or it will not be enforced by the courts. Even, it is believed, the law will not create or imply a contract without a consideration.<sup>1</sup> Also,—

§ 10. **Subject.**—The contract must be for something which the law permits to be contracted for,—not contrary to the law or its policy.<sup>2</sup> Finally,—

§ 11. **Law's Forms.**—In some circumstances, the law has made a particular form necessary; as, by specialty,<sup>3</sup> or by writing not under seal,<sup>4</sup> or by written words prescribed by a statute. A mere oral undertaking, or a written one not conforming to law, will then, of course, be inadequate.

§ 12. **Course of the Discussion.**—These elements of contract, and some others not necessary here to be mentioned, will occupy us through a series of chapters. We shall then proceed with such further unfoldings as will render this outline of the law of contracts in some reasonable degree complete.

### § 13. *The Doctrine of this Chapter restated.*

To sum all up, a contract is a promissory obligation from one person or more to another or to others, or a mutual promissory obligation, in such form, and founded on such reasons, as the justice or policy of the law has prescribed to render it binding. In general, this obligation is not forced upon persons, except as they consent; for, by this rule, the justice and policy of the law are in most instances best promoted. And none can consent without legal and actual capacity. But there are cases in which, if a party resists the

<sup>1</sup> Post, § 403 et seq.

<sup>2</sup> Post, § 455 et seq.

<sup>3</sup> Post, § 560.

<sup>4</sup> Post, § 498 et seq., § 547 et seq.

justice of the law, or is destitute of capacity to consent, and the general or individual weal requires that there should be a contract, the law will imply it as of fact, or create it by indisputable presumption.

## CHAPTER II.

## CONTRACTS UNDER SEAL.

**§ 14. Meaning of Terms.**—A contract under seal is called a specialty; that is, a special contract, in distinction from a simple one,<sup>1</sup> which is another term for a parol contract.<sup>2</sup> The word deed means substantially the same as specialty;<sup>3</sup> but, being commonly employed to designate a conveyance of land, it is practically less distinct when applied to any other sort of sealed instrument. A bond is a particular kind of specialty; the word alone, or “obligation,” or “writing obligatory,” generally implying, *ex vi termini*, a seal,<sup>4</sup> yet possibly not always.<sup>5</sup> The term covenant, also, ordinarily denotes a sealed instrument;<sup>6</sup> but not necessarily in every connection, or so conclusively as the other words.<sup>7</sup> An “indenture” is a particular sort of sealed contract.<sup>8</sup>

**§ 15. How Specialty defined.**—A contract under seal, or specialty, is an executory or executed undertaking in

<sup>1</sup> 2 Bl. Com. 464, 465, and Chitty's notes.

<sup>2</sup> Ante, § 2, 3.

<sup>3</sup> 2 Bl. Com. ut sup.

<sup>4</sup> Toml. Law Dict. “Bond;” Cantey *v.* Duren, Harper, 484; Taylor *v.* Glaser, 2 S. & R. 502; Denton *v.* Adams, 6 Vt. 40; Deming *v.* Bullitt, 1 Blackf. 241; Skinner *v.* McCarty, 2 Port. 19; Harman *v.* Harman, Bald. 129; Harden *v.* Webster, 29 Ga. 427.

<sup>5</sup> Stone *v.* Bradbury, 14 Maine, 185.

<sup>6</sup> Toml. Law Dict. “Covenant;” McVoy *v.* Wheeler, 6 Port. 201; Davis *v.* Judd, 6 Wis. 85; Robbins *v.* Ayres, 10 Misso. 538.

<sup>7</sup> 1 Saund. Wms. ed. 291, note; Van Stanwood *v.* Sandford, 12 Johns. 197; Hays *v.* Lasater, 3 Pike, 565. See Graves *v.* Smedes, 7 Dana, 344.

<sup>8</sup> Spencer, J., in Van Stanwood *v.* Sandford, *supra*; Cabell *v.* Vaughan, 1 Saund. Wms. ed. 291, note 1.

writing, made solemn by the seal of the party. It must be, not on wood,<sup>1</sup> but on paper or parchment.

**§ 16. What the Seal.**—The seal is an impression on any impenetrable substance. In early times it was always wax; but a wafer is as good, and so is any other tenacious material on which an impression is made.<sup>2</sup> In a part of our States, not in others, even a scroll formed with the pen, or the word “ seal,” written or printed, if employed as a seal, is adequate.<sup>3</sup> But the existence of a seal, on an instrument, if not meant to be employed as such, does not make it a specialty;<sup>4</sup> nor can there be a specialty without some sort of seal.<sup>5</sup> One seal will answer for any number of signatures, if each signer adopts it as his own.<sup>6</sup>

**§ 17. Signing.**—One who executes a specialty commonly signs it the same as he does an instrument not sealed. But the signing was early held not to be necessary, where the party puts upon the parchment his seal; for the seal creates the deed.<sup>7</sup> There is probably no modern authority contrary to this early doctrine, which seems still to prevail.<sup>8</sup>

**§ 18. Delivery.**—An instrument, to be a deed, must be delivered; not merely as an escrow, but absolutely.<sup>9</sup>

<sup>1</sup> Pollock Con. 125; Smith Con. 2d Eng. ed. 5.

<sup>2</sup> Tasker *v.* Bartlett, 5 *Cush.* 359; Warren *v.* Lynch, 5 *Johns.* 239; Beardsley *v.* Knight, 4 *Vt.* 471.

<sup>3</sup> Underwood *v.* Dollins, 47 *Misso.* 259; Groner *v.* Smith, 49 *Misso.* 318, 322; Cromwell *v.* Tate, 7 *Leigh.* 301; 4 *Kent Com.* 457.

<sup>4</sup> Clement *v.* Gunhouse, 5 *Esp.* 83; Add. Con. 7th Eng. ed. 20; Blackwell *v.* Hamilton, 47 *Ala.* 470.

<sup>5</sup> The State *v.* Thomson, 49 *Misso.* 188; Vance *v.* Funk, 2 *Scam.* 263; Chilton *v.* People, 66 *Ill.* 501.

<sup>6</sup> Tasker *v.* Bartlett, *supra*; Ball *v.* Dunsterville, 4 *T. R.* 313.

<sup>7</sup> Cromwell *v.* Grunsden, 2 *Salk.* 462; Smith Con. 2d Eng. ed. 5.

<sup>8</sup> Cooch *v.* Goodman, 2 *Q. B.* 580; Jeffery *v.* Underwood, 1 *Pike.* 108; Taunton *v.* Pepler, 6 *Madd.* 166; *Ex parte Hodgkinson*, 19 *Ves.* 291, 296; Wright *v.* Wakefield, 17 *Ves.* 454 *a*, 459.

<sup>9</sup> 4 *Kent Com.* 454; Smith Con. 2d Eng. ed. 6; 1 *Chit. Con.* 11th Am. ed. 4; Cannon *v.* Cannon, 11 *C. E. Green.* 316; Hawkes *v.* Pike, 105 *Mass.* 560; Watkins *v.* Nash, *Law Rep.* 20 *Eq.* 261.

**§ 19. Date and Place.**—On the completion of its execution by delivery it takes effect.<sup>1</sup> No date is essential; and it is good with an impossible date, or one differing from that of the delivery, which will be its date in law; nor need it mention the place where it is executed.<sup>2</sup>

**§ 20. Form of Words.**—As in other instruments, the form of words is immaterial if the meaning is distinct.<sup>3</sup> Thus,—

**§ 21. Name of Obligor.**—The obligor's name need not be in the body of the instrument; or, if it is there, and it differs from the name signed it will be good.<sup>4</sup> But,—

**§ 22. Void if Uncertain—Blank.**—If the name of the obligee or grantee is left in blank,<sup>5</sup> or if, from any other defect, the meaning of the parties cannot be ascertained, the instrument will be null.<sup>6</sup>

**§ 23. The Consideration:**—

**Generally unnecessary.**—As a general rule, a sealed instrument is binding, though no consideration is mentioned in it, and though there is none in fact. The seal is said to import a consideration, and to estop the party from denying it.<sup>7</sup> But,—

<sup>1</sup> Browne *v.* Burton, 5 Dowl. & L. 289, 2 Bail Court, 220.

<sup>2</sup> Anonymous, 7 Mod. 38; Willion *v.* Berkley, 1 Plow. 223, 231; Dodson *v.* Kayes, Yelv. 193; Cromwell *v.* Grimsdale, Comb. 477; s. c. nom. Cromwell *v.* Grunsden, 2 Salk. 462, 1 Ld. Raym, 335; Pierce *v.* Richardson, 37 N. H. 106; Fournier *v.* Cyr, 64 Maine, 32; Armote *v.* Bream, Holt, 212; Goddard's Case, 2 Co. 4 b, 3 Leon. 100; Add. Con. 7th Eng. ed. 18.

<sup>3</sup> Taylor *v.* Preston, 29 Smith, Pa. 436; Bedow's Case, 1 Leon. 25, 3 Ib. 119; Cromwell *v.* Grumsdale, 12 Mod. 193; Dobson *v.* Keys, Cro. Jac. 361; s. c. nom. Dodson *v.* Kayes, Yelv. 193; Saunders *v.* Hanes, 44 N. Y. 353.

<sup>4</sup> Williams *v.* Greer, 4 Hayw. 235, 239; Smith *v.* Crooker, 5 Mass. 538; Fournier *v.* Cyr, 64 Maine, 32, 35; Ex parte Fulton, 7 Cow. 484.

<sup>5</sup> Preston *v.* Hull, 23 Grat. 600; Wunderlin *v.* Cadogan, 50 Cal. 613; Barden *v.* Southerland, 70 N. C. 528; Viser *v.* Rice, 33 Texas, 189; Chase *v.* Palmer, 29 Ill. 306. See Bishop *v.* Morgan, 11 Mod. 275.

<sup>6</sup> Worthington *v.* Hylar, 4 Mass. 196, 205; Swain *v.* Ransom, 18 Johns. 107; post, § 581.

<sup>7</sup> Harris *v.* Harris, 23 Grat. 737; Van Valkenburgh *v.* Smith, 60 Maine, 97;

**§ 24. Exceptions.** — To this proposition there are exceptions; as, —

**Illegal — Against Public Morals — Fraud, etc.** — If the sealed undertaking is to do a thing unlawful, or against public policy or morals, or if the unexpressed consideration for it is in fact thus tainted, or if it was obtained by fraud or duress, the seal will not serve as a screen for the wrong; but the real nature of the transaction, though it does not appear on the face of the instrument, may be shown, and a party may avail himself of this matter, the same as though there were no seal.<sup>1</sup> If the law were not so, the seal “would,” in the words of Lord Ellenborough, “be a cover for every species of wickedness and illegality.”<sup>2</sup> Thus, —

**§ 25. Compounding.** — A bond, the real consideration of which is, though not stated, that the obligee will not appear as prosecutor and witness against another in a criminal cause, will be held void on the fact appearing.<sup>3</sup> Or, —

**§ 26. Unlawful Arrest.** — If one gives a bond to procure his discharge from an unlawful arrest, the consideration and duress may be shown, when it will be adjudged void.<sup>4</sup>

*Sharington v. Strotton*, 1 Plow. 298, 309; *Page v. Trufant*, 2 Mass. 159, 162; *Fallowes v. Taylor*, 7 T. R. 475; *Cooch v. Goodman*, 2 Q. B. 580, Denman, C. J., observing, “that a covenant, being under seal, does not by law require any consideration to support it; and, though an illegal consideration may be shown, and will vitiate it, and if a consideration be stated on the face of a deed a different one may be proved in order to raise a legal defence, yet a mere failure of consideration which once existed may have no more effect than a total want of consideration in the first instance,” p. 599; *Douglass v. Howland*, 24 Wend. 35; *Burkholder v. Plank*, 19 Smith, Pa. 225.

<sup>1</sup> Cases in last note; also *Smith Con.* 2d Eng. ed. 12-16; *Logan v. Plummer*, 70 N. C. 388; *Mitchell v. Reynolds*, 10 Mod. 130, 134; *Hodson v. Ingram*, Aleyn, 60; *Hacket v. Tilly*, 11 Mod. 98; *Beawfage's Case*, 10 Co. 99; *Carpenter v. Beer*, Comb. 246; *Burkholder v. Plank*, 19 Smith, Pa. 225; *Reniger v. Fogossa*, 1 Plow. 1, 19; *Hazard v. Irwin*, 18 Pick. 95, 106; *Obert v. Hammel*, 3 Harrison, 78.

<sup>2</sup> *Paxton v. Popham*, 9 East, 408, 421. See *Hartshorn v. Day*, 19 How. U. S. 211, 222.

<sup>3</sup> *Collins v. Blantern*, 2 Wils. 341; *Goudy v. Gebhart*, 1 Ohio State, 262.

<sup>4</sup> *Bowker v. Lowell*, 49 Maine, 429; *Greathouse v. Dunlap*, 3 McLean, 303.

**§ 27. Exceptional Reasons.**—There are sealed instruments resting on exceptional reasons, therefore requiring a consideration, the same as if not under seal. Among these the principal and perhaps the only ones are—

**Conveyances of Land.**—It was an early rule that, under the statute of uses, “an use,” observes Lord Coke, “cannot be raised by any covenant or proviso, or by bargain and sale, upon a general consideration;” “for it doth not appear to the court that the bargainor hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient or not, and that cannot be when it is alleged in such generality.”<sup>1</sup> A somewhat different statement of the doctrine is, that, by the rules of the equity tribunals, which had the sole jurisdiction of uses before the statute, a use could not be enforced without a consideration, and the statute only made legal what before existed in equity.<sup>2</sup> It became, therefore, and still remains a rule of law that, in conveyances which derive their force from the statute of uses, the seal does not supersede the necessity of a consideration otherwise appearing.<sup>3</sup> And these comprehend most of the conveyances commonly employed in our States.<sup>4</sup> Of course, there may be, by deed as well as parol, executed gifts of lands, the same as of other things, which will be good between the parties without any consideration in fact;<sup>5</sup> but the views here presented would seem to indicate, that, for the deed to be adequate in form, it must mention

<sup>1</sup> Mildmay's Case, 1 Co. 175 *a*, 176 *a*; and see the notes, with the authorities collected, by Thomas.

<sup>2</sup> Hudson *v.* Alexander, 3 Johns. 484, 488, 491.

<sup>3</sup> Smith Con. 2d Eng. ed. 12; Springs *v.* Hanks, 5 Ire. 30; Bolton *v.* Carlisle, 2 H. Bl. 259; Sargent *v.* Reed, 2 Stra. 1228, 1229; 1 Chit. Pl. 8th Am. ed. 366; 2 Ib. 576 et seq.; Thomas's note to 1 Co. 176 *a*; Allen *v.* Florence, 16 Johns. 47; 3 Washb. Real Prop. 4th ed. 368.

<sup>4</sup> Hudson *v.* Alexander, *supra*; Wallis *v.* Wallis, 4 Mass. 135; Parker *v.* Nichols, 7 Pick. 111; Gale *v.* Coburn, 18 Pick. 397, 400; Horton *v.* Sledge, 29 Ala. 478; Platt *v.* Brown, 30 Conn. 336.

<sup>5</sup> 4 Kent Com. 462; Fouty *v.* Fouty, 84 Ind. 433; Shaw *v.* Bran, 1 Stark. 319.

a consideration, which may be a mere fictitious one. And such is the doctrine of some courts,<sup>1</sup> but others hold that no consideration need be even expressed.<sup>2</sup> On the former view, perhaps a "good consideration," in distinction from a "valuable" one,<sup>3</sup> may suffice.<sup>4</sup> On the conveyance of a chattel, a seal imports a consideration, and none need be either expressed or shown in evidence.<sup>5</sup>

**§ 28. In Restraint of Trade.** — A contract in restraint of trade is, in general, void as against public policy.<sup>6</sup> It is equally so, therefore, whether under seal or by parol.<sup>7</sup> But where the restraint contemplated is only partial, the agreement is in many circumstances good; provided — so are the authorities from the earliest time downward — there is for it a valuable consideration.<sup>8</sup> Therefore, as the common law holds that there must be in fact a consideration, it follows — and so, also, are the authorities — that it must appear, equally whether the instrument is under seal or not.<sup>9</sup> If this reasoning seems technical, still such is the established law. Finally, —

<sup>1</sup> Howell *v.* Delancey, 4 Cow. 427; Saunders *v.* Cadwell, 1 Cow. 122; Grout *v.* Townsend, 2 Hill, N.Y. 554, 557; Coxe *v.* Sartwell, 9 Harris, Pa. 480.

<sup>2</sup> Rogers *v.* Hillhouse, 3 Conn. 398; Randall *v.* Ghent, 19 Ind. 271; Croft *v.* Bunster, 9 Wis. 503. See Peacock *v.* Monk, 1 Ves. sen. 127.

<sup>3</sup> Post, § 285, note. It is not my purpose to enquire, with minute accuracy, how the law is on this point in our various States. In Smith Con. 2d Eng. ed. 12, in brackets, it is said: "There are some deeds deriving their effect from the statute of uses—that is, a bargain and sale, and a covenant to stand seized to uses—both of which are void without a consideration; the first requiring a pecuniary one, and the latter a consideration of blood or marriage." Referring to Shep. Touch. 510; and 2 Bl. Com. 338. And see Kirkpatrick *v.* Taylor, 43 Ill. 207; Ford *v.* Ellingwood, 3 Met. Ky. 359; Pennington *v.* Gittings, 2 Gill & J. 208.

<sup>4</sup> The practitioner will, of course, examine and follow the decisions in his own State, on this question and all others where opinions are conflicting.

<sup>5</sup> Bunn *v.* Winthrop, 1 Johns. Ch. 329.

<sup>6</sup> Post, § 478.

<sup>7</sup> Alger *v.* Thacher, 19 Pick. 51; Saratoga County Bank *v.* King, 44 N.Y. 87, 91; Allsopp *v.* Wheatcroft, Law Rep. 15 Eq. 59.

<sup>8</sup> Gunmakers *v.* Fell, Willes, 384; Smith Con. 2d Eng. ed. 133.

<sup>9</sup> 1 Chit. Pl. 8th Am. ed. 366; Met. Con. 2, 233; Tomlinson *v.* Dighton, 1 P. Wms. 149, 196, 197.

§ 29. **Local Usage or Statute.** — “ By local usage in some of the States of the Union, and by statute in others, the want or failure of consideration is a valid defence to a suit on a sealed contract.”<sup>1</sup> And in other States a seal is by statute rendered always unnecessary ; so that an instrument without seal is equally effectual with a sealed one.<sup>2</sup>

§ 30. *High Nature of Specialty:* —

**Superior to other Contracts.** — An instrument under seal is deemed by the law of a higher nature than one not sealed. Therefore, —

§ 31. **Merger.** — If the parties to a simple contract enter into one on the same matter under seal, the former is merged in and extinguished by the latter.<sup>3</sup> Again, —

§ 32. **Varied or Abrogated.** — A specialty cannot be varied or abrogated by words not under seal.<sup>4</sup> Thus, —

§ 33. **Parol License.** — A mere verbal license to one to do a thing contrary to his covenant will not avail the doer in defence of an action on the covenant.<sup>5</sup> But, —

§ 34. **Accord and Satisfaction.** — As a specialty undertaking can be performed without seal, so also without seal there can be accord and satisfaction of it.<sup>6</sup> And, —

<sup>1</sup> Met. Con. 161, 162. And see *Pierce v. Wright*, 33 Texas, 631; *Greathouse v. Dunlap*, 3 McLean, 303; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Stovall v. Barnett*, 4 Litt. 207; 1 Pars. Con. 6th ed. 429.

<sup>2</sup> *McKinney v. Miller*, 19 Mich. 142, 151.

<sup>3</sup> *Chit. Con.* 11th Am. ed. 9; *Smith Con.* 2d Eng. ed. 19; *Robbins v. Ayres*, 10 Misso. 538; *Banorgee v. Hovey*, 5 Mass. 11. See *Witbeck v. Waine*, 16 N. Y. 532; *Charles v. Scott*, 1 S. & R. 294.

<sup>4</sup> *Rutland's Case*, 5 Co. 25 b; *Parker v. Ramsbottom*, 5 D. & R. 138, 3 B. & C. 257; *Miller v. Hemphill*, 4 Eng. 488; *Harper v. Hampton*, 1 Har. & J. 622; *Delacroix v. Bulkley*, 13 Wend. 71; *Sinard v. Patterson*, 3 Blackf. 353; *Thomson v. Brown*, 1 Moore, 358, 7 Taunt. 656; *Rogers v. Payne*, 2 Wils. 376; *Neal v. Sheffield*, Cro. Jac. 254; *Vaughn v. Ferris*, 2 Watts & S. 46; *Perry v. Clymore*, 3 McCord, 245.

<sup>5</sup> *West v. Blakeway*, 2 Man. & G. 729; *Chapman v. McGrew*, 20 Ill. 101. See *Farley v. Thompson*, 15 Mass. 18.

<sup>6</sup> *Alden v. Blague*, Cro. Jac. 99; *Gilson v. Stewart*, 7 Watts, 100. And see *Moody v. Leavitt*, 2 N. H. 171; *Lawall v. Rader*, 2 Grant, Pa. 426; *Reed v. McGrew*, 5 Ohio, 375, 381.

**§ 35. Engraft Parol on It.** — An agreement not under seal may be engrafted on a prior sealed one ; but, by this, the whole is reduced in law to a simple contract.<sup>1</sup> Or,—

**§ 36. Substitute Parol.** — A parol contract may be substituted for a sealed one.<sup>2</sup> Also,—

**§ 37. Rescind by Executed Parol.** — If a parol agreement rescinding a specialty is fully executed, it will be effectual.<sup>3</sup>

**§ 38. *The Doctrine of this Chapter restated.***

An instrument under seal has received, from the ancient law, a dignity superior to any other. In conclusiveness, it occupies a middle ground between a simple contract and a judicial record. But the courts have in modern times abated something—it is difficult to say just how much—of their former respect for it ; and, in a few of our States, it has ceased to be more, or much more, than a simple contract. There is a little uncertainty in the doctrines at some points, or in some of the States ; and practitioners should acquaint themselves specially with the decisions of the courts of their own State relating to this subject.

<sup>1</sup> *Hydeville Co. v. Eagle Railroad and Slate Co.*, 44 Vt. 395 ; *French v. New, 28 N. Y. 147* ; *Archer v. Burden*, 33 Ala. 230 ; *Vaughn v. Ferris*, 2 Watts & S. 46 ; *Aikin v. Bloodgood*, 12 Ala. 221 ; *Whiting v. Heslep*, 4 Cal. 327.

<sup>2</sup> *McGrann v. North Lebanon Railroad*, 5 Casey, Pa. 82 ; *Low v. Forbes*, 18 Ill. 568 ; *Byrd v. Betrand*, 2 Eng. 321 ; *Baird v. Blaigrove*, 1 Wash. Va. 170.

<sup>3</sup> *Phelps v. Seely*, 22 Grat. 573 ; *Green v. Wells*, 2 Cal. 584 ; *Townsend v. Empire State Dressing Co.*, 6 Duer, 208 ; *Dearborn v. Cross*, 7 Cow. 48 ; *Dickerson v. Ripley*, 6 Ind. 128. And see *Brown v. Brine*, 1 Ex. D. 5 ; *Johnston v. Salisbury*, 61 Ill. 316 ; *Lawrence v. Dole*, 11 Vt. 549. See further, as to distinctions in the last few sections, post, § 651-653.

## CHAPTER III.

## CONTRACTS OF RECORD.

§ 39. **How defined.**—A contract of record is one made and entered of record before a judicial tribunal. But,—

§ 40. **Not with Us.**—With, perhaps, exceptions in some of our States, we have no contracts of record other than recognizances, and it is believed to be the same now in England.<sup>1</sup>

§ 41. **Statutes Merchant and Staple.**—Formerly, in England, there were very familiar bonds of record, known as statutes-merchant and statutes-staple. They were a species of recognizance.<sup>2</sup> In rare instances they may have been resorted to in some of our States in early times,<sup>3</sup> but they are now unknown with us.

§ 42. **Recognizance.**—The recognizance, with us, is most frequently, but not exclusively, employed in criminal causes, to bind the parties and witnesses, with the bail and other sureties, for the appearance of the former in court, to prosecute, defend, pay adjudged costs, testify, and the like.

§ 43. **How Recognizance defined.**—As defined in the English books, it is “an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act;<sup>4</sup> as, to appear at the assizes, to keep the peace,” etc.<sup>5</sup>

<sup>1</sup> Smith Con. 2d Eng. ed. 3.

<sup>2</sup> 2 Bl. Com. 160; 4 Ib. 426, 428; 2 Tidd Pr. 1132.

<sup>3</sup> As, see Kilty Rep. Stats. 143.

<sup>4</sup> 2 Tidd Pr. 1131.

<sup>5</sup> Toml. Law Dict. “Recognizance.”

§ 44. **Incidents of Recognizance.**—The incidents of a recognizance are not in every minute particular the same in all our States; being, in some degree, regulated by differing statutes. But, in general, since it is a record, it can be discharged only by a record or by a sealed instrument.<sup>1</sup> The court, on proper grounds, can order it discharged or compounded.<sup>2</sup> The Massachusetts court laid down the doctrine that, after it is forfeited, the tribunal has no power to relieve the conusor against its penalty, as on a hearing in equity upon a bond;<sup>3</sup> but a statute afterward provided for a remission of the penalty in proper cases.<sup>4</sup> It may bind an infant.<sup>5</sup>

§ 45. **Enforcement.**—Like any other record, it proves itself. It may be enforced by “*scire facias*,”—a writ which lies on a record only, and consequently cannot be made use of for the purpose of enforcing any other description of contract.”<sup>6</sup> Other methods of suing upon it need not here be mentioned.

#### § 46. *The Doctrine of this Chapter restated.*

When parties enter into a contract of record before a court, the undertaking becomes itself a sort of judgment in advance against him who may afterward prove to be in default. It does not admit of the same freedom of enquiry into the merits of a case as do other forms of contract. Hence, in general, the law does not suffer parties to resort

<sup>1</sup> *Sewall v. Sparrow*, 16 Mass. 24, 26; *The State v. Moody*, 69 N. C. 529; *Barker v. St. Quintin*, 12 M. & W. 441.

<sup>2</sup> *In re Pellow*, 13 Price, 299; s. c. nom. *Ex parte Pellow*, McClel. 111; 2 Chit. Gen. Pr. 396, 397; *Rex v. Hankins*, McClel. & Y. 27.

<sup>3</sup> *Johnson v. Randall*, 7 Mass. 340; *Merrill v. Prince*, 7 Mass. 396.

<sup>4</sup> *Commonwealth v. Dana*, 14 Mass. 65.

<sup>5</sup> *Ex parte Williams*, McClel. 493, 13 Price, 673. But see *Patchin v. Cromach*, 13 Vt. 330.

<sup>6</sup> *Smith Con. 2d Eng. ed. 4.*

to it. The ordinary recognizance, by which some simple thing, like an appearance, is agreed to be done in the presence of the court itself, is not open to this objection, and is, therefore, permitted.

## CHAPTER IV.

## ORAL CONTRACTS.

**§ 47. How formerly.**—Speech, in the order of time, preceded writing. Even pleadings in court were once, in England, oral; and we have, at the present day, in our own country, remnants of oral pleas.<sup>1</sup> In like manner, it would appear that there was a period in our law when contracts of nearly or quite every sort could be made orally, with the same effect as by writing. Thus, for a long time after the Norman Conquest, a deed was not an essential part of a feoffment, but the feoffor could explain his intent orally, while making livery of seisin upon the land.<sup>2</sup> Since then,—

**§ 48. Changes effected.**—The convenience of business has introduced contracts which, in their nature, could not be oral,—as, for example, oral words for a bill of exchange cannot be transmitted through the mails, or endorsed on its back,—and the needful perpetuation of some other contracts can be secured only by writing. Moreover, legislative policy has, on one ground and another, rendered writing essential to some contracts. Thus exceptions to the general doctrine have been created. Hence,—

**§ 49. All Contracts, except.**—Every contract, on whatever subject, may be in oral words, which will have the same effect as if written, except where some positive rule of the common or statutory law has provided otherwise.<sup>3</sup> Thus,—

<sup>1</sup> 1 Bishop Crim. Proced. § 340, 788-790, 848.

<sup>2</sup> Deane Conv. 300; 4 Kent Com. 450.

<sup>3</sup> Mallory *v.* Gillett, 21 N.Y. 412; Wyman *v.* Goodrich, 26 Wis. 21; Barron *v.* Benedict, 44 Vt. 518; Besshers *v.* Rowe, 46 Misso. 501; Coleman *v.* Eyre, 45

§ 50. **Insurance.**—A contract of insurance, which in practice is usually by written policy, is equally good if verbally made;<sup>1</sup> except where, as in some of our States, a statute provides to the contrary. And,—

§ 51. **Assignment.**—Though an assignment of a debt is commonly by writing, yet a verbal assignment is good.<sup>2</sup> So,—

§ 52. **Arbitration.**—A verbal submission of a controversy to arbitration is valid; except that neither it nor the award can extend to what the parties could not themselves do verbally.<sup>3</sup> Even—

§ 53. **Acceptance.**—A verbal acceptance of a bill of exchange,<sup>4</sup> or of a non-negotiable order,<sup>5</sup> is, if there is no statute to the contrary, good.

§ 54. **Equal in Grade with Written.**—While a verbal contract is not of the same high nature as a specialty,<sup>6</sup> it is, when valid, on exactly the same footing as a written one unsealed.<sup>7</sup> It differs merely in the methods of proof. Both are termed—

N. Y. 38; *Green v. Brookins*, 23 Mich. 48; *White v. Maynard*, 111 Mass. 250; *Parsons v. Loucks*, 48 N. Y. 17; *Selma v. Mullen*, 46 Ala. 411; *Bardwell v. Roberts*, 66 Barb. 433.

<sup>1</sup> *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; *Walker v. Metropolitan Ins. Co.*, 56 Maine, 371; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Hening v. United States Ins. Co.*, 2 Dillon, 26; *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

<sup>2</sup> *Simpson v. Bibber*, 59 Maine, 196, 199; *Ponton v. Griffin*, 72 N. C. 362; *Currier v. Howard*, 14 Gray, 511, 513; *Spafford v. Page*, 15 Vt. 490; *Garnsey v. Gardner*, 49 Maine, 167; *Porter v. Ballard*, 26 Maine, 448; *Crane v. Gough*, 4 Md. 316; *Cleveland v. Martin*, 2 Head, 128; *Rollison v. Hope*, 18 Texas, 446; post, § 563.

<sup>3</sup> *French v. New*, 28 N. Y. 147; *Thomasson v. Risk*, 11 Bush, 619; *Copeland v. Wading River Reservoir*, 105 Mass. 397; *Peabody v. Rice*, 113 Mass. 31; *Phelps v. Dolan*, 75 Ill. 90; *Stockwell v. Bramble*, 3 Ind. 428.

<sup>4</sup> *Pierce v. Kittredge*, 115 Mass. 374; *Scudder v. Union National Bank*, 91 U. S. 406; *Barnet v. Smith*, 10 Fost. N. H. 256; *Stockwell v. Bramble*, 3 Ind. 428.

<sup>5</sup> *Bird v. McElvaine*, 10 Ind. 40.

<sup>6</sup> *Ante*, § 30.

<sup>7</sup> *Ante*, § 2; *Chit. Con.* 11th Am. ed. 5.

§ 55. **Simple Contracts.** — All contracts, not under seal, — that is, all parol contracts, whether written or unwritten, — are known as simple contracts.<sup>1</sup>

§ 56. *The Doctrine of this Chapter restated.*

Since oral words preceded written ones, contracts on every subject, created by mere word of mouth, were originally good. And such is still the general rule. The exceptions are contracts which, in their nature, can be made only in writing ; and those which, by a usage which has grown to be common law, or by some statute, are specially required to be written. *Prima facie*, we look upon an oral contract as good ; but, in the particular sort of case, writing may be found to be necessary.

<sup>1</sup> Add. Con. 7th Eng. ed. 2.

## CHAPTER V.

## SIMPLE CONTRACTS IN WRITING.

§ 57. **How defined.**—A written contract is one which, in all its terms, is in writing.<sup>1</sup> A simple contract in writing differs from a specialty in not being under seal.

§ 58. **Partly in Writing.**—A contract partly in writing and partly oral is an oral contract.<sup>2</sup> But this can be only in the case of an imperfect writing,<sup>3</sup> or where there is first a written contract, and afterward it is changed orally;<sup>4</sup> for oral evidence of what occurred when or before a written contract was made is not admissible to vary its terms,<sup>5</sup> all such matter being deemed to be merged in the writing.<sup>6</sup> But,—

§ 59. **Separate Writings.**—If there are separate writings, on one piece of paper, or several attached pieces, or on separate papers referring to one another, whether made simultaneously or on different occasions and days, all may be regarded as one contract, when this view of them is just,

<sup>1</sup> What is a writing, see post, § 94.

<sup>2</sup> *Ante*, § 31; *Vicary v. Moore*, 2 Watts, 451; *Wright v. Weeks*, 25 N. Y. 153; *Brooks v. Wheelock*, 11 Pick. 489; *Dwight v. Pomeroy*, 17 Mass. 308, 328; *Lang v. Henry*, 54 N. H. 57; *Dana v. Hancock*, 30 Vt. 616; *Briggs v. Vermont Central Railroad*, 31 Vt. 211.

<sup>3</sup> *Post*, § 62.

<sup>4</sup> *Post*, § 647.

<sup>5</sup> *Quartermous v. Kennedy*, 29 Ark. 544; *Woodall v. Greater*, 51 Ind. 539.

<sup>6</sup> *Kelly v. Roberts*, 40 N. Y. 432; *Morse v. Low*, 44 Vt. 561; *Giraud v. Richmond*, 2 C. B. 835. See *Meredith v. Salmon*, 21 Grat. 762; *Hilb v. Peyton*, 21 Grat. 386; *Shepard v. Haas*, 14 Kan. 443.

and accords with the intent of the parties ; and, whether so or not, all should be interpreted together.<sup>1</sup> Yet,—

§ 60. **One Contract or more.**—As foundation for suing, what thus appears to be one contract may in law constitute more contracts than one ; this will depend upon the words, the subject, and the other facts and the justice of the case.<sup>2</sup> Within the same principle,—

§ 61. **Simultaneous—(Oral—Written).**—Two or more contracts may be simultaneously entered into between the same parties, both in writing or both oral, or one in writing and the other oral.<sup>3</sup> Again,—

§ 62. **Writings as Memoranda, etc.**—Parties entering into an oral contract may employ written memoranda in aid of it ; in which case, and in others wherein there are writings evidently not meant to be complete, the contract is oral, and as such is not prevented from being good by what is written.<sup>4</sup>

§ 63. **Receipts.**—In general, receipts of payment, whether embodied in written instruments or not, are deemed to be of the imperfect sort, which may be explained or contradicted orally.<sup>5</sup> And—

<sup>1</sup> Post, § 577; Bobbett *v.* Liverpool, etc., Ins. Co., 66 N. C. 70; Patch *v.* Phoenix, etc., Ins. Co., 44 Vt. 481; Wildman *v.* Taylor, 4 Ben. 42; Heath *v.* Williams, Ind. 495; Taylor *v.* Cornelius, 10 Smith, Pa. 187; Pillow *v.* Brown, 26 Ark. 240, 249; Bradley *v.* Marshall, 54 Ill. 178, 174; Smith *v.* Turnip, 20 Ohio State, 478; Crop *v.* Norton, 2 Atk. 74, 9 Mod. 233; 1 Chit. Con. 11th Am. ed. 146, 147.

<sup>2</sup> More *v.* Bonnet, 40 Cal. 251; Davidson *v.* Peticolas, 34 Texas, 27.

<sup>3</sup> Phillips *v.* Preston, 5 How. U. S. 278; Garrow *v.* Carpenter, 1 Port. 359; Berryman *v.* Hewit, 6 J. J. Mar. 462; Page *v.* Sheffield, 2 Curt. C. C. 377; Price *v.* Sturgis, 44 Cal. 591.

<sup>4</sup> Mobile Marine, etc., Co. *v.* McMillan, 31 Ala. 711; The Alida, 1 Abb. Adm. 178; Pacific Iron Works *v.* Newhall, 34 Conn. 67; Ruggles *v.* Swanwick, 6 Minn. 526; Pinney *v.* Thompson, 3 Iowa, 74.

<sup>5</sup> Rollins *v.* Dyer, 16 Maine, 475; Marston *v.* Wilcox, 1 Scam. 270; Walters *v.* Odom, 53 Ga. 286; Smith *v.* Holland, 61 N. Y. 635; Ryan *v.* Ward, 48 N. Y. 204; Hannan *v.* Oxley, 23 Wis. 519; Bryant *v.* Hunter, 6 Bush, 75. See Grumley *v.* Webb, 48 Misso. 562.

§ 64. **Date.**—The same applies to the date of the writing. *Prima facie* it is the true date, but the real fact may be shown.<sup>1</sup>

§ 65. **Consideration.**—In like manner, the consideration, which is not the promise of the parties with its special terms and limitations, but merely the thing of value whereby they were moved to make the promise,<sup>2</sup> ought always to be open to enquiry by oral evidence. The better doctrine, certainly in principle, holds it to be so.<sup>3</sup> But the adjudications are confused and variable, perhaps all admitting that, in general,<sup>4</sup> where a deed requires a consideration, it may be shown by parol, though not expressed; others holding, yet still others denying, that the same rule applies to simple contracts in writing; and, lastly, another class maintaining, what the better doctrine rejects, that, though this is so where the writing is silent as to a consideration, if it expresses one, no evidence can be received to explain or contradict the written words. Now, according to what is deemed the just view, the reason of the rule which forbids oral evidence to control a written instrument does not extend to the consideration, therefore the rule itself should not.<sup>5</sup>

<sup>1</sup> Smith *v.* Porter, 10 Gray, 66; ante, § 14; Perrin *v.* Broadwell, 3 Dana, 596. See Seldonridge *v.* Connable, 32 Ind. 375; Richards *v.* Betzer, 53 Ill. 466.

<sup>2</sup> Post, § 406.

<sup>3</sup> As, for example, in Holmes's Appeal, 29 Smith, Pa. 279; Wilkinson *v.* Scott, 17 Mass. 249, 257; Kinzie *v.* Penrose, 2 Scam. 515; Rockhill *v.* Spraggs, 9 Ind. 30; Jones *v.* Jones, 12 Ind. 389; Lawton *v.* Buckingham, 15 Iowa, 22; Emmons *v.* Littlefield, 13 Maine, 238; Kumler *v.* Ferguson, 7 Minn. 442; Morris Canal, etc., Co. *v.* Ryerson, 3 Dutcher, 457; Wooden *v.* Shotwell, 3 Zab. 465; Jack *v.* Dougherty, 3 Watts, 151; Curry *v.* Lyles, 2 Hill, S. C. 404; Holbrook *v.* Holbrook, 30 Vt. 432; Hannah *v.* Wadsworth, 1 Root, 458; Strawbridge *v.* Cartledge, 7 Watts & S. 394. But see Murphy *v.* Mobile Branch Bank, 16 Ala. 90; Morse *v.* Shattuck, 4 N. H. 229; Schemerhorn *v.* Vanderheyden, 1 Johns. 139; Emery *v.* Chase, 5 Greenl. 232. Where the expression is, "for divers good considerations," the real consideration may be shown. Johnson *v.* Boyles, 26 Ala. 576.

<sup>4</sup> See ante, § 23.

<sup>5</sup> Ante, § 23; Ely *v.* Wolcott, 4 Allen, 506, 507; Peacock *v.* Monk, 1 Ves.

§ 66. *The Doctrine of this Chapter restated.*

All contracts which are good when orally made, may, if the parties choose, be in writing. But, unless they are sealed, they rank in law only as parol contracts ; in other words, as simple contracts. Some contracts are, by special provisions of law, required to be in writing. To these the parties may affix their seals if they choose ; and, though they are thus made specialties, they are still written, within the laws which require writing.<sup>1</sup> A writing may constitute a part of an oral contract ; as, where it is a mere accompanying memorandum, or where what was once a written contract has been varied orally, or the like. Whether a transaction or form of words has created one contract or more than one will depend upon the intent of the parties, the subject, their words, and the construction of law thereon.

sen. 127 ; Llanelly Railway, etc., *v.* London, etc., Railway, Law Rep. 7 H. L. 550, 556, 8 Ch. Ap. 942 ; Goward *v.* Waters, 98 Mass. 596, 599 ; Kirkham *v.* Boston, 67 Ill. 509 ; Coggeshall *v.* Coggeshall, 1 Strob. 43 ; Arms *v.* Ashley, 4 Pick. 71 ; Attix *v.* Pelan, 5 Iowa, 386 ; Tingley *v.* Cutler, 7 Conn. 291 ; Mouton *v.* Noble, 1 La. An. 192 ; Cummings *v.* Dennett, 26 Maine, 397 ; Patchin *v.* Swift, 21 Vt. 292 ; Thompson *v.* Blanchard, 3 Comst. 335 ; Long *v.* Davis, 18 Ala. 801 ; Pettibone *v.* Roberts, 2 Root, 258 ; Smith *v.* Brooks, 18 Ga. 440 ; Herrick *v.* Bean, 20 Maine, 51 ; Newton *v.* Jackson, 23 Ala. 335 ; Marsh *v.* Lisle, 34 Missis. 173 ; Warren *v.* Walker, 28 Maine, 453 ; Haynes *v.* Rogillio, 20 La. An. 238 ; Collier *v.* Mahan, 21 Ind. 110 ; Aurora *v.* Cobb, 21 Ind. 492 ; Swope *v.* Forney, 17 Ind. 385 ; Burrill *v.* Saunders, 36 Maine, 409. As to the consideration in cases within the statute of frauds, see post, § 512.

<sup>1</sup> McKensie *v.* Farrell, 4 Bosw. 192.

## CHAPTER VI.

## CONTRACTS IMPLIED AS OF FACT.

§ 67. **Not differ from Express.**—A contract which, as a question of fact, not of law, is implied, does not differ from an express one except in form of proof. But it is so often spoken of in our books as an implied contract as to render this separate mention of it desirable. Moreover,—

§ 68. **Presumptions of Fact and Law mingle.**—In numerous cases, as actually presented to the tribunal, where the parties are capable, and are not affirmatively shown to have been averse to contracting, the two questions blend,—Did they enter into a contract in form? In the absence of any formal contract, shall one be presumed by the law? Therefore, in such a case, the jury passes upon the whole issue, under proper instructions from the court as to the law involved in the latter question.<sup>1</sup> But—

§ 69. **Actual Contract presumed.**—There are many cases, not here to be particularized,—since we are discussing the law, not the evidence of contract,—in which an express agreement, in distinction from an implied one, will be presumed by the jury as of fact.<sup>2</sup> An illustration of this occurs where the question is whether or not there has been a—

§ 70. **Marriage.**—The marriage status is created only where the parties expressly agree to assume it. No court

<sup>1</sup> Chamberlin *v.* Donahue, 44 Vt. 57; Whaley *v.* Peak, 49 Misso. 80; Cauble *v.* Ryman, 26 Ind. 207; Davenport *v.* Mason, 15 Mass. 85; Belden *v.* Meeker, 47 N. Y. 307, 311; Cock *v.* Oakley, 50 Missis. 628; Boyle *v.* Parker, 46 Vt. 343.

<sup>2</sup> Boothby *v.* Scales, 27 Wis. 626.

ever imposed it on them as of law. Yet, more often than otherwise, it is shown in proof, not by witnesses to the contract, but by circumstantial evidence.<sup>1</sup>

*§ 71. The Doctrine of this Chapter restated.*

The contract treated of in this chapter is an express one, proved by circumstantial evidence. And, should the question whether it was in writing, or even whether it was under seal, be important, there are cases in which the affirmative of this also may be shown by the like evidence. Thus, to draw another illustration from the proof of marriage, its existence may be presumed from circumstances, even under laws which require minute formalities in its constitution.

<sup>1</sup> 1 Bishop Mar. & Div. § 218, 219, 237, 482-518, 538.

## CHAPTER VII.

## CONTRACTS IMPLIED AS OF LAW.

- § 72, 73. General Doctrine and Introduction.
- 74-88. Illustrations of the Doctrine.
- 89-93. Limits of the Doctrine.
- 94. Doctrine of the Chapter restated.

**§ 72. The Doctrine, with Distinctions and Similitudes.**—Those implied contracts which are to be treated of in this chapter are pure creations of law, not depending for their existence upon any presumptions of fact. They are never known in a form entirely executory; but, in some circumstances, not all, after one party has received a benefit from another, the law commands payment, though there was truly no bargain between them, and no promise of payment was made in any form. And the law's method of doing this is by creating a contract; in other words, by presuming that one existed, and refusing to receive proof that it did not. Now, these implied contracts are alike in this, that all are creations of the law where none existed in fact. In some instances, there is no proof whether there was an express contract or not. But the test is,—Would affirmative proof that none existed alter the case? If it would, the contract, if any, is not created by law; if it would not, it is. But, in another particular, the contracts of this chapter differ. In some of them the party might avoid being bound by a timely disclaimer; and he is holden simply because he remained silent while receiving a benefit. In others, the implied promise of payment grows out of a

duty quite distinct from his will ; and, though he should protest he would not pay, and do all he could to avoid the contract, still the law would impose it upon him.

**§ 73. How the Chapter divided.** — The distinction last stated would seem to indicate a line on which to divide the discussions of this chapter. But, in the facts of cases, the one class is found mingled with the other ; and the line, which is theoretically so plain, is practically indistinct. We shall, therefore, bring to view, I. Illustrations of the Doctrine ; II. Limits of the Doctrine.

*I. Illustrations of the Doctrine.*

**§ 74. Goods ordered.** — If one orders goods from a trader, but says nothing of pay, a promise to pay for them will be implied by law.<sup>1</sup> Or, —

**§ 75. Work and Services.** — If he procures work or services from a person under no special ties of relationship or the like, or even receives knowingly the benefit of them, the law raises the presumption that he promised to pay for what he accepted to his own advantage.<sup>2</sup> But, —

**§ 76. Voluntary.** — If it is shown in the particular case that the services were not rendered for pay, but were voluntary, no payment for them can be recovered, however great the benefit conferred.<sup>3</sup> Nor will the hope of a bequest or gift from the party served change this result.<sup>4</sup> Or, —

**§ 77. Relationship.** — Should the parties be father and

<sup>1</sup> Met. Con. 4.

<sup>2</sup> Moreland *v.* Davidson, 21 Smith, Pa. 371 ; Ford *v.* Ward, 26 Ark. 360 ; James *v.* Bixby, 11 Mass. 35, 37 ; In re Scott, 1 Redf. 234 ; Farmington Academy *v.* Allen, 14 Mass. 172, 176 ; St. Patrick's Church *v.* Abst, 76 Ill. 262 ; Camfrancq *v.* Pilie, 1 La. An. 197 ; Dougherty *v.* Whitehead, 31 Misso. 255.

<sup>3</sup> Force *v.* Haines, 2 Harrison, 385 ; White *v.* Jones, 14 La. An. 681 ; James *v.* O'Driscoll, 2 Bay, 101 ; Watson *v.* Ledoux, 8 La. An. 68 ; Bartholomew *v.* Jackson, 20 Johns. 28.

<sup>4</sup> Davison *v.* Davison, 2 Beasley, 246 ; Little *v.* Dawson, 4 Dall, 111 ; Lee *v.* Lee, 6 Gill & J. 316 ; Kennard *v.* Whitson, 1 Houston, 36.

son, or other near relatives, the presumption of a contract to pay for the services on the one hand, and for board on the other, will not ordinarily arise.<sup>1</sup> Again,—

§ 78. **Suretyship.**—One who becomes surety for another is, if compelled to pay, entitled to recover the amount of him on a contract which the law will imply, though nothing on the subject was said when the suretyship was entered into.<sup>2</sup> And,—

§ 79. **Joint Promisors.**—In a case not of suretyship, if two have jointly undertaken to pay a particular sum, one who pays the whole can recover half of it from the other.<sup>3</sup>

§ 80. **Cases distinguished.**—In the foregoing cases there is no improbability that, in fact, the party may have promised payment. But, in other cases, plainly he did not. Thus,—

§ 81. **Money wrongfully obtained.**—If, by fraud, duress, or any trespass, a man gets possession of another's money or other property, the law raises the promise to return the same, though plainly he did not mean to do it, and could not have so contracted in fact.<sup>4</sup> Or,—

§ 82. **Labor of Apprentice.**—If a man knowingly entices away, or takes by force, or harbors another's apprentice, the law creates a promise from him to the

<sup>1</sup> *Harris v. Currier*, 44 Vt. 468; *Mariner v. Collins*, 5 Harring. Del. 290; *Cauble v. Ryman*, 26 Ind. 207; *Hertzog v. Hertzog*, 5 Casey, Pa. 465; *Hayes v. McConnell*, 42 Ind. 285; *Daubenspeck v. Powers*, 32 Ind. 42.

<sup>2</sup> *Copis v. Middleton*, Turn. & R. 224; *Gibbs v. Bryant*, 1 Pick. 118, 121; *Powell v. Smith*, 8 Johns. 249; *Hassinger v. Solms*, 5 S. & R. 4, 8; *Ward v. Henry*, 5 Conn. 595; *Appleton v. Bascom*, 3 Met. 169.

<sup>3</sup> *Owens v. Collinson*, 3 Gill & J. 25. And see *Snyder v. Kirtley*, 35 Misso. 423.

<sup>4</sup> *Gilbert v. Ross*, 1 Strob. 287; *Hinsdill v. White*, 34 Vt. 558; *Pheteplace v. Eastman*, 26 Iowa, 446; *Swatara Railroad v. Brune*, 6 Gill, 41; *Gorman v. Carroll*, 7 Allen, 199; *Jamison v. Moon*, 48 Missis. 548; *Gordon v. Bruner*, 49 Misso. 570; *Hagaman v. Neitzel*, 15 Kan. 383; *McDonald v. Todd*, 1 Grant, Pa. 17; *McDonald v. Peacemaker*, 5 W. Va. 439; *Allen v. Burlington*, 45 Vt. 202; *Wilson v. Short*, 6 Hare, 366.

master to pay the latter for the services rendered by the apprentice.<sup>1</sup> In these cases, and those mentioned in the last section, there is generally a concurrent remedy by an action for the tort, which the injured party may elect if he chooses. Again,—

**§ 83. Duty done — (Husband and Wife — Parent and Child).**—There are duties which the law or good conscience casts on men; and, on their performance, a promise from the person benefited to pay is created, or not, according to the nature of the case. The relation of husband and wife is so intimate and mutually dependent that no promise is implied by either to pay for services rendered by the other.<sup>2</sup> And so it is generally of the relation of parent and minor child.<sup>3</sup> But, where there is no such mutual dependence, and one discharges a duty to another, expecting to be paid for it, conferring on him a benefit which necessity required him to have, the law will create a promise to pay. Thus,—

**§ 84. Medical Aid in Emergency.**—Should a medical practitioner be called by an unauthorized person to a man deprived of his senses by a blow, rendering immediate relief necessary to save life, duty would require that the relief be given. And, if the practitioner gave it, not in charity but expecting to be paid, the law would create a promise of payment from the patient, who, in fact, not even asked for the aid, or consented to its being rendered; being incapable of asking or consenting.<sup>4</sup> So,—

**§ 85. Necessaries, etc., to Insane Person.**—In any case of insanity, one who, by formal agreement with the insane person, not knowing of the mental unsoundness, or otherwise acting in good faith at the call of an emergency,

<sup>1</sup> *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Tant. 112; *Eades v. Vandeput*, 5 East, 39, note, 4 Doug. 1.

<sup>2</sup> 1 Bishop Mar. Women, § 883, 886, 887; 2 Ib. § 438, 456, and other places.

<sup>3</sup> 2 Kent Com. 189 et seq.; *ante*, § 77.

<sup>4</sup> *Arguendo*, in *Richardson v. Strong*, 13 Ire. 106, 107.

supplies him with what the law terms "necessaries,"—being things needful to his sustenance or comfort, and suitable to his means, condition, and habits of life,—can recover a reasonable compensation for them, on a promise implied by law. "If the law were not so, the insane might perish."<sup>1</sup> Even expenditures and services for the protection of the insane person's estate may be included in this class.<sup>2</sup> And the cases go to the extent that, though a contract with such person is, as a contract, void or voidable, yet, if the other party does not know of the insanity, and confers on him or his estate a substantial benefit by executing what was in good faith supposed to be a valid agreement, and the parties cannot, on a rescission of such agreement, be placed *in statu quo*, he may be compelled to pay what the benefit conferred was worth.<sup>3</sup>

**§ 86. Necessaries to Infants.**—Though an infant (being any person under twenty-one years of age) has not the same power of contract as an adult, yet, if he is not provided for by his parents, and is in want, one who, in response to his request, supplies him with necessities can recover of him what they are worth, on a contract which the law will create.<sup>4</sup> The drawing of a tooth by a dentist, when decayed and giving him pain, is within this rule.<sup>5</sup> By the doctrine of some courts, denied by others, an infant in need, not emancipated or deserting his home, may in like manner charge his father for reasonable necessities;<sup>6</sup> in many cir-

<sup>1</sup> Sawyer *v.* Lufkin, 56 Maine, 308; Richardson *v.* Strong, 13 Ire. 106; Pearl *v.* McDowell, 3 J. J. Mar. 658; Skidmore *v.* Romaine, 2 Brad. 122; Leach *v.* Marsh, 47 Maine, 548; Baxter *v.* Portsmouth, 5 B. & C. 170.

<sup>2</sup> Williams *v.* Wentworth, 5 Beav. 325.

<sup>3</sup> Wilder *v.* Weakley, 34 Ind. 181; Matthiessen & Weichers Refining Co. *v.* McMahon, 9 Vroom, 537; Lancaster National Bank *v.* Moore, 28 Smith, Pa. 407; Behrens *v.* McKenzie, 23 Iowa, 333; Ballard *v.* McKenna, 4 Rich. Eq. 358; Sims *v.* McLure, 8 Rich. Eq. 286; Dodds *v.* Wilson, 1 Tread. 448.

<sup>4</sup> Parsons *v.* Keys, 43 Texas, 557; Met. Con. 69.

<sup>5</sup> Strong *v.* Foote, 42 Conn. 203.

<sup>6</sup> 2 Bishop Mar. & Div. § 528.

cumstances, by all opinions, he will be presumed to have authority from the parent.<sup>1</sup>

§ 87. **Necessaries to Wife.** — Whatever be the rule between parent and child, the duty of the husband to support the wife, while she is in the path of duty, is by all opinions absolute. And if, not being herself in the wrong, she is destitute through his neglect or refusal, the law will create a promise by him to pay any third person who may furnish necessities to her, at her request, directing them to be charged to him.<sup>2</sup> Again, —

§ 88. **Saving Property.** — The duty to save the property of a third person is so absolute that he who does it in an emergency when otherwise it would be lost, not in mere voluntary kindness,<sup>3</sup> but expecting to be paid, can recover from the owner compensation for his outlay or labor, on a contract created by law. If the owner had abandoned the article, and did not seek to reclaim it, the rule would be otherwise ; for then it would belong to the finder.<sup>4</sup>

## II. *Limits of the Doctrine.*

§ 89. **No Contract in Fact.** — As already observed,<sup>5</sup> the doctrine of this chapter proceeds on the hypothesis that, in fact, no contract existed between the parties ; either there being none in form, or a formal one being invalid. And the absence of proof as to how this was, is equivalent to a showing that there was none. But, —

§ 90. **Express Contract.** — If there was an express con-

<sup>1</sup> And see *Stanton v. Willson*, 3 Day, 37; *Keaton v. Davis*, 18 Ga. 457; *Gordon v. Potter*, 17 Vt. 348; *Weeks v. Morrow*, 40 Maine, 151; *Townsend v. Burnham*, 33 N. H. 270; *Kelly v. Davis*, 49 N. H. 187.

<sup>2</sup> 1 *Bishop Mar. & Div.* § 553, 555, 565, 568 et seq., 578.

<sup>3</sup> *Watson v. Ledoux*, 8 La. An. 68.

<sup>4</sup> 2 *Kent Com.* 356; *Chase v. Corcoran*, 106 Mass. 286. See *Perkins v. Ladd*, 114 Mass. 420; *Boothe v. Fitzpatrick*, 36 Vt. 681.

<sup>5</sup> *Ante*, § 72.

tract, and it was valid, the case is different. The acts of the parties having been done under it, and its terms not departed from, it will furnish the limit of their respective rights, and no contract will be implied.<sup>1</sup> There is authority for the qualification, that, if the express contract is not under seal, and embraces only what the law would imply, a party suing may proceed on it or on the implied contract at his election.<sup>2</sup> But this is contrary to reason, for it imputes to the law the folly of creating a useless thing,—that is, a contract for which there is no occasion,—and it is believed not to be the better doctrine.<sup>3</sup> When work has been done, or anything delivered and accepted, that creates an implied promise to pay for it; and the rule is the same, though it was in execution of an express contract,<sup>4</sup> or partly in execution of such contract, which was in part departed from.<sup>5</sup>

**§ 91. Express Contract void.**—Where there is an express contract, which is voidable or void, and thereupon the law creates a contract,—as, where necessaries are furnished to a minor or insane person on a formal agreement,—the terms of such contract are not controlling, though they may be looked to, but the party is to recover what the thing furnished was reasonably worth.<sup>6</sup>

<sup>1</sup> *Toussaint v. Martinnant*, 2 T. R. 100; *North v. Nichols*, 37 Conn. 375; *Whiting v. Sullivan*, 7 Mass. 107; *Draper v. Randolph*, 4 Harring. Del. 454; *Voorhees v. Combs*, 4 Vroom. 494.

<sup>2</sup> *Gibbs v. Bryant*, 1 Pick. 118; *Princeton, etc., Turnpike v. Gulick*, 1 Harrison, 161.

<sup>3</sup> And see *Walker v. Brown*, 28 Ill. 378; *Dermott v. Jones*, 2 Wal. 1; *Hyde v. Liverse*, 1 Cranch C. C. 408; *Maupin v. Pic*, 2 Cranch C. C. 38; *Brockett v. Hammond*, 2 Cranch C. C. 56; *Brown v. Perry*, 14 Ind. 32; *Eggleston v. Buck*, 24 Ill. 262; *Western v. Sharp*, 14 B. Monr. 177; *Chandler v. The State*, 5 Har. & J. 284.

<sup>4</sup> *Draper v. Randolph*, *supra*; *Elder v. Hood*, 38 Ill. 533; *Met. Con.* 7.

<sup>5</sup> *Adams v. Cosby*, 48 Ind. 153; *Watchman v. Crook*, 5 Gill & J. 239.

<sup>6</sup> *Parsons v. Keys*, 43 Texas, 557; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Hyer v. Hyatt*, 3 Cranch C. C. 276.

**§ 92. Payment originally expected.** — We have seen,<sup>1</sup> that, if services are rendered gratuitously, pay cannot afterward be claimed. And it is believed that no contract will be implied where the consideration was originally intended for a gift.<sup>2</sup> Thus, —

**§ 93. Charity — Relief by Town to Pauper.** — What is given to the poor cannot be recovered back ; and, if a town, under the poor laws, bestows immediate relief on a person having a lawful settlement, it cannot afterward, in the absence of fraud, make him pay for the relief, as on an implied promise, though he is able.<sup>3</sup>

**§ 94. *The Doctrine of this Chapter restated.***

When a duty is cast upon one by a statute,<sup>4</sup> or by what is sometimes termed “equity and good conscience” (the standard whereof is to be found in the books of the law rather than in those on moral science),<sup>5</sup> or in any way by the law, whether statutory or common,<sup>6</sup> — or, when one has been benefited by another who was discharging such a duty,<sup>7</sup> or responding to an imperative social call,<sup>8</sup> under the

<sup>1</sup> *Ante*, § 76.

<sup>2</sup> *Whaley v. Peak*, 49 Misso. 80 ; *Schnell v. Schroder*, 1 Bailey Eq. 834 ; *Safety Deposit Life Ins. Co. v. Smith*, 65 Ill. 309 ; *Rockford, etc., Railroad v. Sage*, 65 Ill. 328 ; *Watson v. Ledoux*, 8 La. An. 68 ; *Davenport v. Mason*, 15 Mass. 85, 90.

<sup>3</sup> *Stow v. Sawyer*, 3 Allen, 515, 517.

<sup>4</sup> *Waller v. Kentucky Bank*, 3 J. J. Mar. 201, 205 ; *Bath v. Freeport*, 5 Mass. 325 ; *Brigham v. Eveleth*, 9 Mass. 538 ; *Hillsborough v. Londonderry*, 43 N. H. 451.

<sup>5</sup> *Howe v. Buffalo, etc., Railroad*, 37 N. Y. 297 ; *Turner v. Jones*, 1 Lans. 147 ; *Thompson v. Thompson*, 5 W. Va. 190 ; *Allen v. McKean*, 1 Sumner, 276, 317 ; *Wilson v. Sergeant*, 12 Ala. 778 ; *Gardner Manuf. Co. v. Heald*, 5 Greenl. 381 ; *Brinckerhoff v. Wemple*, 1 Wend. 470 ; *Wilby v. Phinney*, 15 Mass. 116 ; *Stuart v. Lake*, 33 Maine, 87.

<sup>6</sup> *Baker v. Thayer*, 3 Met. 312, 315 ; *ante*, § 83.

<sup>7</sup> *Camden v. Mulord*, 2 Dutcher, 49.

<sup>8</sup> *Hewett v. Bronson*, 5 Daly, 1.

anticipation of being paid,—or, again, has knowingly accepted something of value from another, who may be presumed to have been expecting compensation,<sup>1</sup> the law creates a promise from him to do the thing or pay for the benefit. Yet these propositions are to be accepted as in some degree limited and defined by what has been the course of the courts heretofore. In other words, the law creates a promise from one person to another, though none was in fact made, whenever such assumed promise is necessary as a foundation on which to enforce so much of natural, statutory, or common-law justice as comes within judicial cognizance. Hence, in the application of these principles, the court takes into view the equities of the individual case, what has been decided before, and the analogies to be drawn from the entire statutory and unwritten law; being, however, in the main, guided by past decisions in like cases.

<sup>1</sup> *Day v. Caton*, 119 Mass. 513.

## CHAPTER VIII.

## CONTRACTS IMPLIED FROM EXPRESS ONES.

§ 95. **Nature of.**—Men, when they speak, and even when they write, do not put all their meaning into words. From this fact grows the proposition that, in law, they will often be understood to mean, while contracting, more than they say. Thus, —

§ 96. **Title to Thing sold—(Warranty).**—If one sells an article of personal property in his possession, as his own, and for a fair price, in law he also warrants the title.<sup>1</sup> But when he has it not in possession,<sup>2</sup> and in some other circumstances,<sup>3</sup> there is no warranty of title implied. Also, —

§ 97. **Quality.**—The warranty by implication of law does not ordinarily extend to the quality of a chattel sold, even where the full price for a good article is paid.<sup>4</sup> But,

<sup>1</sup> 2 Kent Com. 478; Williamson *v.* Sammons, 34 Ala. 691; Linton *v.* Porter, 81 Ill. 107; Chancellor *v.* Wiggins, 4 B. Monr. 201; Defreeze *v.* Trumper, 1 Johns. 274; Cozzins *v.* Whitaker, 3 Stew. & P. 322; Boyd *v.* Whitfield, 19 Ark. 447; Sherman *v.* Champlain Transp. Co., 31 Vt. 162; Costigan *v.* Hawkins, 22 Wis. 74; Fawcett *v.* Osborn, 32 Ill. 411; Word *v.* Cavin, 1 Head, 506. See Sparks *v.* Messick, 65 N. C. 440.

<sup>2</sup> Lackey *v.* Stouder, 2 Ind. 376; Huntington *v.* Hall, 36 Maine, 501; Scranton *v.* Clark, 39 N. Y. 220; Scott *v.* Hix, 2 Sneed, Tenn. 192; Long *v.* Hickington-bottom, 28 Missis. 772.

<sup>3</sup> Richardson *v.* Tipton, 2 Bush, 202; The Monte Allegre, 9 Wheat. 616; Yates *v.* Bond, 2 McCord, 382.

<sup>4</sup> 1 Bishop Crim. Law, 6th ed. § 11; post, § 219; Preston *v.* Dunham, 52 Ala. 217; West *v.* Cunningham, 9 Port. 104; Mason *v.* Chappell, 15 Grat. 572; Weimer *v.* Clement, 1 Wright, Pa. 147; Beninger *v.* Corwin, 4 Zab. 257; Johnston *v.* Cope, 3 Har. & J. 89; Penniman *v.* Pierson, 1 D. Chip. 394; Dean *v.* Mason, 4 Conn. 428; Boit *v.* Mavbin, 52 Ala. 252; Gossler *v.* Eagle

on this question, judicial opinions are not quite harmonious; some accepting the doctrine of the civil law, contrary to the common-law rule, that the taking of a sound price warrants the article sound.<sup>1</sup> And the implied warranty of soundness may extend to things at sea, or otherwise not in a position to be inspected by the purchaser, and to sales by sample.<sup>2</sup>

§ 98. **Warranty of Note.**—If one sells a promissory note, the law implies the warranty that it is not forged, but genuine and binding on the parties,<sup>3</sup> and not subject to any legal defence.<sup>4</sup> So—

§ 99. **Faithfulness and Capacity.**—A person who undertakes a particular business contracts also, by implication, with his employer to integrity, care, and reasonable skill.<sup>5</sup> Again,—

§ 100. **Warranty of Agency.**—One who enters into a contract with another as the agent of a third person, agrees also with the other, in matter of law, that he is such agent.<sup>6</sup>

Sugar Refinery, 103 Mass. 381; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Jones v. Murray*, 3 T. B. Monr. 83; *Emerson v. Brigham*, 10 Mass. 197; *Moses v. Mead*, 1 Denio, 378, 5 Ib. 617; *Bartlett v. Hoppock*, 34 N. Y. 118; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Wright v. Hart*, 18 Wend. 449; s. c. in court below, nom. *Hart v. Wright*, 17 Wend. 267; *Holden v. Dakin*, 4 Johns. 421.

<sup>1</sup> *Champneys v. Johnson*, 2 Brev. 268; *Rose v. Beattie*, 2 Nott & McC. 538; *Crawford v. Wilson*, 2 Mill, 353; *Barnard v. Yates*, 1 Nott & McC. 142; *Lester v. Graham*, 1 Mill, 182; *Missroon v. Freeman*, 2 Nott & McC. 76; *Mitchell v. Dubose*, 1 Mill, 360; *Thompson v. Lindsay*, 1 Tread. 236, 3 Brev. 305; *Toris v. Long, Taylor*, 17.

<sup>2</sup> *Moore v. McKinlay*, 5 Cal. 471; *Getty v. Rountree*, 2 Chand. 28; *Fish v. Roseberry*, 22 Ill. 288; *Howard v. Howey*, 23 Wend. 350; *Hanks v. McKee*, 2 Litt. 227; *Waring v. Mason*, 18 Wend. 425; *Whitaker v. Hueske*, 29 Texas, 355; *Phelps v. Quinn*, 1 Bush, 375.

<sup>3</sup> *Lobdell v. Baker*, 1 Met. 193; *Merriam v. Wolcott*, 3 Allen, 258; *Bell v. Cafferty*, 21 Ind. 411. And see *Presbury v. Morris*, 18 Misso. 165.

<sup>4</sup> *Fake v. Smith*, 2 Abb. Ap. Dec. 76. And see *Thomas v. Bartow*, 48 N. Y. 193.

<sup>5</sup> Met. Con. 5; *Stevens v. Walker*, 55 Ill. 151; *Zulkee v. Wing*, 20 Wis. 408; *Waul v. Hardie*, 17 Texas, 553.

<sup>6</sup> *Collen v. Wright*, 7 Ellis & B. 301, 8 Ib. 647; *Baltzen v. Nicolay*, 53 N. Y.

§ 101. **In Conveyances of Land.**—In conveyances of land, warranties are implied.<sup>1</sup> Generally they may exist though there are express warranties also, but they cannot have an effect contrary to what is expressed.<sup>2</sup> It will not be well here to enter into this learning; but,—

§ 102. **Land bounded on Street.**—Where a deed bounds the land on one side by a way, it creates by implication the covenant that there is such a way.<sup>3</sup>

§ 103. **Implications from Particular Terms.**—In the illustrations thus far, the implied contract has, in the main, grown out of the general nature of the express one, or of the sort of transaction. In other instances, it depends more on the particular terms of the express contract. As,—

§ 104. **“House” — “Mill.”**—In a grant or reservation, the word “house” or “mill” carries by implication the land on which it stands, being necessary to the enjoyment of the thing expressed.<sup>4</sup>

§ 105. **General Doctrine.**—The foregoing are but illustrations of a general doctrine; namely, that, from an expressed undertaking, the law will also imply whatever the parties may be reasonably supposed to have meant, and what is essential to render the transaction fair and honest.

§ 106. *The Doctrine of this Chapter restated.*

When parties enter into a contract in terms, the law presumes each of them to be acting in good faith toward the

467; *Spedding v. Nevell*, Law Rep. 4 C. P. 212; *Richardson v. Williamson*, Law Rep. 6 Q. B. 276.

<sup>1</sup> 4 Kent Com. 473.

<sup>2</sup> *Roebuck v. Duprey*, 2 Ala. 535; *Blair v. Hardin*, 1 A. K. Mar. 231; *Morris v. Harris*, 9 Gill, 19; *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Mass. 162, 201; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Kent v. Welch*, 7 Johns. 258; *Crouch v. Fowle*, 9 N. H. 219.

<sup>3</sup> *Parker v. Smith*, 17 Mass. 413; *Emerson v. Wiley*, 10 Pick. 310, 315; *Tobey v. Taunton*, 119 Mass. 404.

<sup>4</sup> *Bacon v. Bowdoin*, 22 Pick. 401, 406; *Webster v. Potter*, 105 Mass. 414, 415.

other ; and it binds each to the other, to whatever good faith requires. The implication may be derived from the words employed, from the acts of the parties viewed in connection with the thing contracted about, or from the nature of the transaction. But herein, as in all other things, the law proceeds on its own reasons, and follows its own precedents ; so that, in a particular case, the question whether or not a contract is to be implied, enlarging or limiting the express one, and, if so, what it shall be, must be answered by a resort to the adjudications, rather than to natural reason and the books of ethics.

## CHAPTER IX.

## FURTHER OF THE IMPLIED CONTRACTS OF THE LAST TWO CHAPTERS.

- 2 107, 108. Introduction.
- 109-120. Created by Law where none in Fact.
- 121-124. Grafted by Interpretation on Express.
- 125. Doctrine of the Chapter restated.

§ 107. **Distinctions—What for this Chapter.**—The contracts of the last two chapters—namely, those created by law where there is none in fact, and those which are grafted by interpretation on express ones—constitute two classes differing from each other, and each differing from the express contract, while in leading features all contracts are alike. It is the purpose of this chapter to call attention to some differences and similitudes.

§ 108. **How the Chapter divided.**—We shall consider,  
I. Contracts created by Law where there is none in Fact;  
II. Contracts grafted by Interpretation on Express ones.

I. *Contracts created by Law where there is none in Fact.*

§ 109. **Word “Contract.”**—Frequently, and perhaps more often than otherwise, a legal person, employing the word contract, means by it an undertaking voluntarily entered into between the parties; not drawing into contemplation any creation of the law.<sup>1</sup> And such is nearly, or quite, the universal popular meaning. Therefore,—

<sup>1</sup> Indeed, the more common definitions in our books are so; as, “an agree-

§ 110. **In Statutes and Private Writings.**—When the word “contract” is employed in a statute, or in a written agreement between parties, it is generally interpreted as exclusive of creations and acts of the law. For example,—

§ 111. **Statute of Frauds.**—The statute of frauds,<sup>1</sup> under which contracts on some particular subjects are required to be in writing, is construed as not extending to those which are created by law or by special statutes, not depending on the will of the parties.<sup>2</sup> Within this rule are—

§ 112. **Resulting Trusts.**—When land is bought and paid for with the money of one man and the deed is made to another, and there is no evidence or presumption that a gift was intended, the law will imply a promise by the grantee to hold it in trust for the person whose money procured the conveyance. This is called a resulting trust.<sup>3</sup> Now the statute of frauds, in force, with slight variations, in England and all our States, requires agreements affecting interests in lands to be in writing. Some forms of the statute expressly except resulting trusts; but, whether the exception is in the statute or not, the consequence is the same; namely, that the trust thus created by law is good, though there is no writing declaring it, and it may be even shown by verbal evidence.<sup>4</sup> By a like construction,—

ment in which a *party undertakes to do*,” etc. *Ante*, § 1, note. And, in this sense, oftener than in its full meaning, the word is used in our treatises on contracts. So the popular dictionaries of the language limit the significance of the word in the same way.

<sup>1</sup> As to which see *post*, § 498.

<sup>2</sup> *Thompson v. Blanchard*, 3 Comst. 335; *Doolittle v. Dininny*, 31 N. Y. 350; *Smith v. Bradley*, 1 Root, 150; *Goodwin v. Gilbert*, 9 Mass. 510.

<sup>3</sup> *2 Bishop Mar. Women*, § 118 et seq.; *Follansbe v. Kilbrehth*, 17 Ill. 522; *Chastain v. Smith*, 30 Ga. 96; *Brown v. Dwelley*, 45 Maine, 52; *Smith v. Boquet*, 27 Texas, 507; *Gee v. Gee*, 32 Missis. 190; *Hatton v. Landman*, 28 Ala. 127; *Partridge v. Havens*, 10 Paige, 618; *Douglass v. Brice*, 4 Rich. Eq. 322; *Shepherd v. White*, 10 Texas, 72.

<sup>4</sup> 4 *Kent Com.* 305, 306; *Caple v. McCollum*, 27 Ala. 461; *Cook v. Kennerly*, 12 Ala. 42; *McGuire v. Ramsey*, 4 Eng. 518; *Dean v. Dear*, 6 Conn. 285;

**§ 113. Bankruptcy as to Assignment of Policy.**—An insurance policy, with a clause making it void if assigned without the consent of the party insuring, does not become so on an assignment in bankruptcy, executed by the register in pursuance of law.<sup>1</sup> So,—

**§ 114. Condition in Covenant.**—A lease with condition that the lessee shall not “let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture,” does not prevent the leased premises being taken in execution, even though the judgment was confessed on a warrant of attorney from the lessee. By express words, it would be in the power of the parties to prevent this result.<sup>2</sup> Therefore,—

**§ 115. Not Written or Unwritten.**—A contract created by law—not merely presumed,<sup>3</sup> but created<sup>4</sup>—constitutes a class by itself; being deemed neither written nor unwritten.

**§ 116. Mental and Legal Capacity.**—While an express contract requires mental and legal capacity in the party, the law can create one without. We have seen illustrations of this in cases of infants and insane persons.<sup>5</sup> Thus,—

**§ 117. Infant for Wife's Ante-nuptial Debts.**—An infant cannot contract to pay the debts of another.<sup>6</sup> Yet, if he marries, the law creates for him the contract to pay the ante-nuptial debts of his wife.<sup>7</sup> Again,—

**§ 118. Implied in Infant's accepting Deed-poll.**—As

*Peabody v. Tarbell*, 2 *Cush.* 226; *Hanff v. Howard*, 3 *Jones Eq.* 440; *James v. Fulcrud*, 5 *Texas*, 512; *Leakey v. Gunter*, 25 *Texas*, 400; *Cloud v. Ivie*, 28 *Miss.* 578; *Farrington v. Barr*, 36 *N. H.* 86; *Benson v. Matsdorf*, 11 *Johns.* 90; *Malin v. Malin*, 1 *Wend.* 625; *Slaymaker v. St. Johns*, 5 *Watts*, 27.

<sup>1</sup> *Starkweather v. Cleveland Ins. Co.*, 2 *Abb. U. S.* 67.

<sup>2</sup> *Mitchinson v. Carter*, 8 *T. R.* 57.

<sup>3</sup> *Ante*, § 67, 70.

<sup>4</sup> *Ante*, § 72 et seq.

<sup>5</sup> *Ante*, § 85, 86.

<sup>6</sup> *Maples v. Wightman*, 4 *Conn.* 376; *Nightingale v. Withington*, 15 *Mass.* 272, 274.

<sup>7</sup> *Butler v. Breck*, 7 *Met.* 164.

an infant has the capacity to accept an estate, he is bound by any conditions in the deed conveying it to him.<sup>1</sup> Plainly, therefore, if the deed has recitals of things to be done by the grantee, the law, which would found a promise upon them were he of age, will do it equally in the case of an infant. But, further, —

**§ 119. Continued—Law's Promise not a Specialty.**— Though a promise created by the law comes through a specialty, it is not itself deemed to be such; just as, we have seen,<sup>2</sup> it is not either written or oral. If one accepts a deed-poll conveying lands, and it recites that he shall do such and such things, the law creates a promise in him to do them; but the promise is not, like the deed-poll, under seal. It is not a covenant, but a simple-contract promise, on which the action of *assumpsit*, but not of covenant, may be maintained.<sup>3</sup> Neither is the promise deemed to be in writing, for it is not within the statute of frauds; it is, let us repeat, simply a promise in law.<sup>4</sup>

**§ 120. Similitudes.** — In most other respects, these implied contracts do not differ from express ones. As just said, the action of *assumpsit* will lie upon them.<sup>5</sup> And they are declared upon in the same manner as express contracts. For example, the allegation of a promise is necessary.<sup>6</sup> Indeed, the suit appears to be in every particular the same as upon any other contract not under seal.

<sup>1</sup> *Parker v. Lincoln*, 12 Mass. 16, 18.

<sup>2</sup> *Ante*, § 115.

<sup>3</sup> *Harriman v. Park*, 55 N. H. 471; *Mellen v. Whipple*, 1 Gray, 317; *Brewer v. Dyer*, 7 Cush. 337, 340; *Guild v. Leonard*, 18 Pick. 511; *Nugent v. Riley*, 1 Met. 117; *Newell v. Hill*, 2 Met. 180.

<sup>4</sup> *Goodwin v. Gilbert*, 9 Mass. 510, 514; *Harriman v. Park*, *supra*, Smith, J., at p. 472.

<sup>5</sup> *Johnson v. Reed*, 3 Eng. 202; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Wyman v. American Powder Co.*, 8 Cush. 168, 180; *Pawlet v. Sandgate*, 19 Vt. 621; *Stimpson v. Sprague*, 6 Greenl. 470; *Downing v. Freeman*, 18 Maine, 90; *Wood v. O'Kelley*, 8 Cush. 406; *Monson v. Williams*, 6 Gray, 416.

<sup>6</sup> *Wingo v. Brown*, 12 Rich. 279.

*II. Contracts grafted by Interpretation on Express Ones.*

§ 121. **The differing Principle.**—Though these contracts, like those discussed under the last sub-title, are implied by the law, yet the principle governing them after they are created is different. It is, that what is implied in an express contract is as much a part of it as what is expressed.<sup>1</sup> Therefore,—

§ 122. **The Rule.**—What comes from an express contract by construction of law is to be deemed a part of it; and it takes the degree of a specialty, of a written contract not under seal, or of an oral one, according to the degree of the contract whence it was derived. Thus,—

§ 123. **Statute of Frauds.**—Implications, created by construction, may be added to the words of a contract, to render it a sufficient writing under the statute of frauds.<sup>2</sup> Again,—

§ 124. **Implied Covenants.**—Where covenants are implied in a deed—that is, come by construction from it—they are to be deemed as parts of the deed. The action for the breach of them is to be covenant and not assumpsit, and they are to be set out in the declaration in the same manner as if they were expressed.<sup>3</sup>

§ 125. *The Doctrine of this Chapter restated.*

Those implied contracts which come from express ones are, in fact, parts of the express contracts themselves; though, upon some of them, not upon all, separate suits

<sup>1</sup> Hudson Canal *v.* Pennsylvania Coal Co., 8 Wal. 276. It is the same of what is implied in a statute. 2 Bishop Mar. Women, § 63.

<sup>2</sup> Smith Con. 2d Eng. ed. 53; Hawes *v.* Armstrong, 1 Bing. N. C. 761; Fessenden *v.* Mussey, 11 Cush. 127.

<sup>3</sup> Grannis *v.* Clark, 8 Cow. 36; Barney *v.* Keith, 4 Wend. 502; Shaeffer *v.* Geisenburg, 11 Wright, Pa. 500; Wood *v.* Hardisty, 2 Collyer, 542.

may be maintained. The other class of implied contracts, which more emphatically the law creates, have a distinct status of themselves. In pleading, where things are set out according to their legal effect, this promise is alleged in the same manner as an express promise, while in real fact it may be the reverse of what the party expressed. And persons having no capacity to make a promise—such as insane people and infants—have this promise created for them, the same as those who have the capacity. Its grade is that of a simple contract, never a specialty; yet it is not deemed to be written, nor is it treated as oral. The law, having created it, enforces it without reference to artificial distinctions.

## CHAPTER X.

## ESTOPPEL AS A SPECIES OF CONTRACT CREATED BY LAW.

§ 126. **What for this Chapter.**—Estoppels are of several sorts, not all of which have any relation to contracts. We shall consider only, in brief, some which are related.

§ 127. **How defined.**—An estoppel, of the sort now under consideration, is where one, in violation of legal or social duty, does, omits, or says something, implying or affirming what is not true; and another, relying upon it, takes some step he otherwise would not, to his injury; in which case the former is not permitted to deny the assumed fact, in any controversy with the latter, to his prejudice. What is really false, is, as between the parties, when thus acted upon, to be conclusively taken as true.<sup>1</sup> Thus,—

<sup>1</sup> In a late English case, Brett, J., stated the doctrine as follows: "If, in the transaction itself, which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act, by mistake, upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist." *Carr v. London, etc., Railway*, Law Rep. 10 C. P. 307, 318. And see *Phillips v. Im Thurn*, Law Rep. 1 C. P. 463; *Continental Bank v. Commonwealth Bank*, 50 N. Y. 575; *Helmsley v. Loader*, 2 Camp. 450; *Lipscombe v. Holmes*, 2 Camp. 441; *O'Brien v. Wetherell*, 14 Kan. 616; *Gotham v. Gotham*, 55 N. H. 440; *Richmond v. Dubnque*, etc., Railroad, 33 Iowa, 422; *Carroll v. Manchester*, etc., Railroad, 111 Mass. 1; *Connihan v. Thompson*, 111 Mass. 270; *Mercer Mining and Manuf. Co. v. McKee*, 27 Smith, Pa. 170; *Hooker v. Hubbard*, 102 Mass. 239; *Eaton v. Winnie*, 20 Mich. 156; *Kuhl v. Jersey City*, 8 C. E. Green, 84; *Payne v. Burnham*, 62 N. Y. 69; *Conrad v. Callery*, 22 La. An. 428; *Barnard v. Campbell*, 55 N. Y. 456; *Baltes v. Ripp*, 1 Abb. Ap. Dec. 78; *Lacy v. Wilson*, 24 Mich. 479.

**§ 128. Own Property sold.**—If one discovers that his own property, whether real or personal, is being sold by a third person to another, who is about to purchase it in ignorance of any defect in the title, common duty, due from every man to every other, demands of him to make known to the purchaser his claim. Then, if he does not, and especially if he entices the purchaser to buy, or if he is guilty of any other deceit or neglect amounting to a fraud, in consequence of which the purchase is made, he is estopped, as the phrase is,—that is, forbidden by law,—to set up his claim in a court afterward; so that the purchaser practically gets a good title.<sup>1</sup>

**§ 129. Compared with Contract as of Law.**—In another form of words, the estoppel is, that the law creates a contract of warranty, of a limited nature, between the person misleading and the other who is misled. The warranty is that the fact shall be as represented. Yet this contract of estoppel is so far of an executed nature that a suit cannot be maintained upon it. And perhaps the true distinction is that, when a contract created by law is in the executed form, it is called an estoppel *in pais*; when it is executory, it is known by the other name. But, to proceed with illustrations,—

**§ 130. Division Line.**—If two adjoining proprietors recognize a particular line as the true dividing one, and one of them erects improvements and maintains undisputed possession for many years, the other will be estopped thereby though the line was erroneous, and the statute of limitations has not fully run.<sup>2</sup> Moreover,—

<sup>1</sup> 2 Bishop Mar. Women, § 487; Winchell *v.* Edwards, 57 Ill. 41; Leeper *v.* Hersman, 58 Ill. 218; Davidson *v.* Silliman, 24 La. An. 225; Miller *v.* Springer, 20 Smith, Pa. 269; Dean *v.* Martin, 24 La. An. 103; Trowbridge *v.* Matthews, 28 Wis. 656; Sweezey *v.* Collins, 40 Iowa, 540. See Brown *v.* Tucker, 47 Ga. 485.

<sup>2</sup> Majors *v.* Rice, 57 Misso. 384. See Day *v.* Caton, 119 Mass. 513; Calumbet *v.* Pacheco, 48 Cal. 395.

**§ 131. Erecting House on Parol Promise.** — It has been held that a father who promises his son to convey to him a piece of land on his erecting a house upon it, is, when the house is erected, estopped from claiming title to the premises as against the son.<sup>1</sup> Again, —

**§ 132. Existence of Corporation.** — One cannot, in the same transaction, both affirm and deny the existence of a corporation ; as, if he gives a note running to a corporation, he is estopped, when called on for payment, to deny the existence of the corporate body.<sup>2</sup> And —

**§ 133. Under Will.** — One accepting a benefit under a will is estopped from asserting a claim repugnant to its provisions.<sup>3</sup>

**§ 134. Promotion of Justice — Favored or not.** — These illustrations show the ground on which equitable estoppels, as they are called, proceed. There are estoppels of another sort, which are said to be not favored in the law, because they exclude the truth ;<sup>4</sup> but these equitable estoppels admit the truth, and they are favored because they prevent fraud and establish justice.<sup>5</sup> And the courts will not allow them where their effect would be otherwise.<sup>6</sup>

**§ 135. Between whom.** — They operate only between parties and their privies ; strangers not being permitted to take advantage of them.<sup>7</sup>

<sup>1</sup> *Campbell v. Mayes*, 38 Iowa, 9.

<sup>2</sup> *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48; *Tarleton v. Kennedy*, 21 La. An. 500; *White v. Ross*, 4 Abb. Ap. Dec. 589. See *Aller v. Cameron*, 3 Dillon, 198; *McCullough v. Talladega Ins. Co.*, 46 Ala. 376; *Hungerford National Bank v. Van Nostrand*, 106 Mass. 559; *Mud Creek Draining Co. v. The State*, 48 Ind. 236.

<sup>3</sup> *Cox v. Rogers*, 27 Smith, Pa. 160. And see *Scholay v. Rew*, 23 Wal. 331.

<sup>4</sup> *Leicester v. Rehoboth*, 4 Mass. 180; *Owen v. Bartholomew*, 9 Pick. 520, 527; *Abbot v. Wilbur*, 22 La. An. 368.

<sup>5</sup> *The State v. Pepper*, 31 Ind. 75; *Buckingham v. Hanna*, 2 Ohio State, 551.

<sup>6</sup> *Mills v. Graves*, 38 Ill. 455.

<sup>7</sup> *Simpson v. Pearson*, 31 Ind. 1; *Griffin v. Richardson*, 11 Ire. 439; *Massure v. Noble*, 11 Ill. 531.

§ 136. **Wide Effect—(Lands conveyed by).**—The effect of these estoppels is sometimes very sweeping; as, for instance, real estate, which can only be directly conveyed by deed, may indirectly, as already appears, be made to pass by matter *in pais*, without any writing, under the operation of an estoppel.<sup>1</sup>

§ 137. *The Doctrine of this Chapter restated.*

Estoppels and contracts created by law are, when properly viewed, to be ranked among what are called legal fictions. A legal fiction is something which the law, for the promotion of justice, or for the convenience of litigation, or for some other sufficient reason, assumes as true, contrary to the real fact; and it will be given such form and so restricted as not to work injustice, or contravene the purpose of its creation.<sup>2</sup> An estoppel, therefore, takes place whenever, without it, the justice or order of the law would fail; and, where the matter pertains to contract, it operates as a species of contract created by the law. And, as the law creates contracts which the parties have no capacity to enter into voluntarily,<sup>3</sup> so, by an estoppel, it may accomplish what they could not do voluntarily, even by deed.<sup>4</sup>

<sup>1</sup> *Brown v. Wheeler*, 17 Conn. 345; *Irion v. Mills*, 41 Texas, 310.

<sup>2</sup> *Co. Lit.* 150 *a*; *Mostyn v. Fabrigas*, *Coupl.* 161, 177; *Bennett v. Isaac*, 10 *Price*, 154; *Junk v. Canon*, 10 *Casey*, *Pa.* 286; *Weisenfeld v. Mispelhorn*, 5 *W. Va.* 46.

<sup>3</sup> *Ante*, § 84 et seq.

<sup>4</sup> 2 *Bishop Mar. Women*, § 488.

## CHAPTER XI.

## CONTRACTS DISTINGUISHED AS EXECUTORY AND EXECUTED.

§ 138. **The Terms defined.**—A contract is executed when the thing agreed has been done.<sup>1</sup> It is executory, when the thing has not been done.<sup>2</sup> If one party has performed his part, but the other has not his, the contract is executed on the one side and executory on the other. Sometimes one who is to do a thing has commenced the doing, but not finished; then his undertaking is executed in part and in part executory.

§ 139. **Effect of Executed.**—When a contract is executed,—if it was valid, between competent parties, and the execution was in exact accordance with its terms,—it has ceased to be of interest in the law. Indeed, it no longer exists. If it was invalid in substance, or between incompetent parties, or if the execution was defective yet accepted as good, the case may be different, or it may not, according to the facts. Thus,—

§ 140. **Executed Contract against Law.**—If parties mutually agree to do a thing contrary to law or public policy, neither can enforce the undertaking against the other; still, should they proceed voluntarily and perform what they have unlawfully agreed, it is the same as though the contract had been originally good. Neither can recover of the other what was thus voluntarily parted with.<sup>3</sup> The

<sup>1</sup> *Frazer v. Robinson*, 42 Missis. 121; *Robison v. Robison*, 44 Ala. 227.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87, 136.

<sup>3</sup> *Greenwood v. Curtis*, 6 Mass. 358; *Levet v. Creditors*, 22 La. An. 105; *Morris v. Hall*, 41 Ala. 510; *Green v. Hollingsworth*, 5 Dana, 178; *Ingersoll v.*

reason assigned for this is, that, the parties being equally in fault, the law will help neither. Whence it follows, that, —

§ 141. **Unlawful in One.** — If, as in some special cases it happens, the contract was unlawful in one of the parties only, the other may recover back what he has paid under it.<sup>1</sup> And this principle is sometimes even carried to the extent that, —

§ 142. **One less in Fault.** — If both are in fault, yet not equally so, and especially if the one more in the wrong has taken any unconscientious advantage of the other, the more culpable party may be compelled to refund what the less culpable has paid.<sup>2</sup>

§ 143. **Voluntary and not Illegal.** — Where neither party has committed a violation of law or public policy, and there is no fraud, duress, or anything of the sort, the rule is, that a voluntary payment which one with full knowledge of the facts has made to the other cannot be recovered back, though he was not compellable to make it, and he did it under protest. The executed transaction stands.<sup>3</sup>

§ 144. **Mistake of Law.** — As all persons are conclusively presumed to know what the law is,<sup>4</sup> one who makes a

Campbell, 46 Ala. 282; Marksbury *v.* Taylor, 10 Bush, 519; Myers *v.* Meinrath, 101 Mass. 366; Barnard *v.* Crane, 1 Tyler, 457; Burt *v.* Place, 6 Cow. 431; Babcock *v.* Thompson, 3 Pick. 446; Worcester *v.* Eaton, 11 Mass. 368; Merwin *v.* Huntington, 2 Conn. 209; Groton *v.* Waldoborough, 2 Fairf. 306; Jacobs *v.* Stokes, 12 Mich. 381; Spalding *v.* Muskingum, 12 Ohio, 544; Tyler *v.* Smith, 18 B. Monr. 793; Linee *v.* Hesing, 44 Ill. 113; Arter *v.* Byington, 44 Ill. 468; Boutelle *v.* Melendy, 19 N. H. 196.

<sup>1</sup> Jaques *v.* Golightly, 2 W. Bl. 1073, 1075, and other English and American cases cited by Selden, J., in Tracy *v.* Talmage, 4 Kernan, 162, 183 et seq. And see Curtis *v.* Leavitt, 15 N. Y. 9; post, § 465, 466.

<sup>2</sup> Smith *v.* Bromley, 2 Doug. 695, note; Worcester *v.* Eaton, 11 Mass. 368, 376; Tracy *v.* Talmage, 4 Kernan, 162, 181.

<sup>3</sup> Awalt *v.* Eutaw Building Association, 34 Md. 435; Williams *v.* Colby, 44 Vt. 40; Commercial Bank *v.* Reed, 11 Ohio, 498; Patterson *v.* Cox, 25 Ind. 261; Benson *v.* Monroe, 7 Cush. 125; Cook *v.* Boston, 9 Allen, 393.

<sup>4</sup> Bishop Crim. Law, § 294 et seq.

payment supposing himself compellable while he is not — that is, pays under a mistake of law — cannot recover the money back. In legal contemplation, his act was voluntary.<sup>1</sup> But, —

**§ 145. Mistake of Fact — Fraud — Duress of Goods.** — If he paid under a mistake of fact,<sup>2</sup> or through fraud or other constraint from the other party,<sup>3</sup> or to prevent being dispossessed of his property, though he knew the demand to be illegal,<sup>4</sup> he may have his money again.

**§ 146. The Principle — (Implied Promise).** — Though, in these cases where a payment back is enforced, the original payment was in the nature of an executed contract, still, as it was not purely voluntary, and was received in the other party's wrong, the law creates a promise to refund, and on this implied promise the suit is founded.

**§ 147. Void Oral Contracts.** — If persons enter into a contract which cannot be enforced because not in writing, yet they execute its provisions, neither can undo what has thus been done.<sup>5</sup> Even, —

**§ 148. Executed on One Side.** — If such a contract has been executed on one side only, the party of the other side cannot be compelled to refund what he has received under it, so long as he stands ready to execute it on his side. If he refuses, he must refund. The law creates the promise that he will.<sup>6</sup>

<sup>1</sup> *Elliott v. Swartwout*, 10 Pet. 187; *Mowatt v. Wright*, 1 Wend. 355; *Bramham v. San José*, 24 Cal. 585; *Silliman v. Wing*, 7 Hill, N. Y. 159.

<sup>2</sup> *Manchester v. Burns*, 45 N. H. 482; *Bank of Commerce v. Union Bank*, 3 Comst. 230; *North v. Bloss*, 30 N. Y. 374; *Pearson v. Lord*, 6 Mass. 81; *Bond v. Hays*, 12 Mass. 34, 36; *Lazell v. Miller*, 15 Mass. 207; *Morrell v. Wright*, 1 Wend. 355; *Burr v. Veeder*, 3 Wend. 412; *Dickens v. Jones*, 6 Yerg. 483.

<sup>3</sup> *Ante*, § 81.

<sup>4</sup> *Maxwell v. Griswold*, 10 How. U. S. 242; *Harmony v. Binham*, 2 Kernan, 99, 109; *White v. Heylman*, 10 Casey, Pa. 124; *Beckwith v. Frisbie*, 32 Vt. 559; *Elston v. Chicago*, 40 Ill. 514; *Harvey v. Olney*, 42 Ill. 336; *Quinnett v. Washington*, 10 Misso. 53.

<sup>5</sup> *Cocking v. Ward*, 1 C. B. 858; *Freeman v. Headley*, 4 Vroom, 523.

<sup>6</sup> *Beaman v. Buck*, 9 Sm. & M. 207; *Richards v. Allen*, 17 Maine, 296;

§ 149. **In General.** — Such are some of the distinctions between executed and executory contracts. It follows that the executory ones will chiefly occupy us in these pages. Indeed, the word contract alone, though properly enough employed to denote both sorts, is oftener used in our books as signifying an agreement which is executory, at least on one side. If two persons mutually promise that the one shall buy of the other, who shall sell, a piece of land, we call this a contract while it remains executory ; but not after the money is paid and the deed is delivered.

§ 150. *The Doctrine of this Chapter restated.*

In general, when a thing contracted for is performed, the contract is ended. And we call this an executed contract. Before performance, we term the contract executory. But, in some circumstances, after execution, a remnant remains for the law to operate upon ; as, if the contract was illegal on one side, but good on the other ; or, if there was fraud, duress, mistake of fact, or the like. Even in these cases, the contract, strictly speaking, is at an end ; and the law implies, what it does not in ordinary circumstances, a new contract in compensation for violated rights, or to adjust equities between the parties.

Congdon *v.* Perry, 18 Gray, 8; Bennett *v.* Phelps, 12 Minn. 326; Marsh *v.* Wykoff, 10 Bosw. 202; Clancy *v.* Craine, 2 Dev. Eq. 363.

## CHAPTER XII.

## VOID AND VOIDABLE IN CONTRACTS.

- ¶ 151-153. Introduction.
- 154-157. Void.
- 158-162. Voidable.
- 163. Doctrine of the Chapter restated.

§ 151. **Uncertainty of Meaning.**—The words void and voidable are, in law writings, often used in a way to render the meaning doubtful or confused. Nor is the difficulty all in the language; it extends also to the idea to be conveyed, which, though at times plain and simple, is at other times refined and even complex.

§ 152. **How defined.**—A contract is void when it is without any legal effect.<sup>1</sup> It is voidable when it has some effect, but is liable to be made void by one of the parties or a third person.<sup>2</sup>

§ 153. **How the Chapter divided.**—We shall consider, I. Void; II. Voidable.

I. *Void.*

§ 154. **One Meaning.**—In exact legal language, as now understood, there is but one meaning for the term void, being as above defined. But,—

§ 155. **Consequences of Void—(Executed).**—While a

<sup>1</sup> *Zouch v. Parsons*, 3 Bur. 1794, 1805; *Baker v. Painter*, Law Rep. 2 C. P. 492, 496; *Manning v. Gill*, Law Rep. 13 Eq. 485, 489.

<sup>2</sup> *Pearsoll v. Chapin*, 8 Wright, Pa. 9.

void contract cannot, by any subsequent act, be confirmed,<sup>1</sup> nor will it constitute an adequate consideration for a new contract;<sup>2</sup> still, in the voluntary performance of it, consequences may be produced which will not be void. Thus, within a principle already stated,<sup>3</sup> if one voluntarily pays money on a void contract, knowing the facts which render it void, whether mistaking the law or not, he cannot recover the money back.<sup>4</sup> A void deed of lands conveys nothing.<sup>5</sup> And a void sale of goods passes no title, though they are delivered.<sup>6</sup>

§ 156. **Executory.**—A void executory contract cannot, of course, be enforced by either party.<sup>7</sup>

§ 157. **Word "Void" used as "Voidable."**—Not unfrequently in our books the word void is inaccurately used in the sense of voidable;<sup>8</sup> and, in some instances, where at the first impression it might seem so, the use is correct. For an example of the latter, an agreement to marry

<sup>1</sup> Perkins, § 154, as cited by Lord Mansfield in *Zouch v. Parsons*, 3 Bur. 1794, 1805; Lowrie, C. J., in *Pearsoll v. Chapin*, 8 Wright, Pa. 9, 15.

<sup>2</sup> *Murphy v. Jones*, 7 Ind. 529; *Ehle v. Judson*, 24 Wend. 97; *Jarvis v. Sutton*, 3 Ind. 289.

<sup>3</sup> *Ante*, § 143, 144.

<sup>4</sup> *Post*, § 433, 434; *Woodburn v. Stout*, 28 Ind. 77.

<sup>5</sup> *Manning v. Gill*, Law Rep. 13 Eq. 485.

<sup>6</sup> Com. Dig. "Enfant," C. 2. **What void.**—As to what particular contracts are void, Lowrie, C. J., in *Pearsoll v. Chapin*, *supra*, at p. 14, 15, said: "Contracts and acts that are absolutely void are contracts to do an illegal act, or omit a legal public duty; usually bonds of married women; contracts in a form forbidden by law; official acts of persons having no recognized *de facto* or *de jure* title to the office; contracts to do an impossible thing, or that leave uncertain the thing to be done, and such like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties, and even a stranger may raise the objection. 2 Leon. 218; Moore, 105. The law cannot enforce that, the doing of which would be a wrong to itself or to public order." In the following pages the reader will see various other illustrations of void contracts.

<sup>7</sup> *Post*, § 195, 274.

<sup>8</sup> *Pearsoll v. Chapin*, 8 Wright, Pa. 9, 13; *Matthews v. Baxter*, Law Rep. 8 Ex. 132, 133.

between an infant and an adult is *voidable*,<sup>1</sup> but the expression *void at the election of the infant* would be equally good law-English, and more precise. “Provisions in leases,” said Lowrie, C. J., “are very common, that, if the tenant shall not, with due promptness, perform his covenants to build, repair, insure, pay rent, and such like, the lease shall be *void*, or utterly null and void, to all intents and purposes, or expressions of similar import; yet these terms are very often, perhaps generally, held to mean *voidable*, and not *void*.<sup>2</sup>” It is believed by the writer, however, that, if the phrase “at the election of the lessor” is incorporated by construction into such a form of words, they will thereby be rendered strictly accurate.

## II. *Voidable*.

§ 158. **Some Effect.**—We have seen,<sup>3</sup> that a voidable contract, instead of being a mere nullity, has, till avoided, some effect. Now, as the reader travels over the following pages, he will observe that this effect is not uniform. If there is any force in the contract, yet the power exists in the hands of some person—as, one of the parties, or a creditor, in the case of a conveyance to defraud creditors<sup>4</sup>—to avoid the contract, we term it *voidable*; so that the sorts of voidable contracts vary greatly. And our language has no terms to distinguish the sorts from one another; hence, in our books, ambiguities on this subject arise. To illustrate,—

### § 159. **Voidable in Fraud, Infancy, Insanity.**—In a

<sup>1</sup> *Holt v. Clarenceux*, 2 Stra. 987, 989. The expression in this case, however, is, “*voidable at his election*.” *Voidable* is what may be avoided; consequently this expression is good, meaning that the contract may be avoided at his election. But the expression, “*void at his election*,” would be equally good; meaning that, when his election had been made and executed, the contract would be void, though it was only voidable before.

<sup>2</sup> *Pearsoll v. Chapin*, *ut sup.* at p. 18.

<sup>3</sup> *Ante*, § 152.

<sup>4</sup> See observations of Lowrie, C. J., in *Pearsoll v. Chapin*, 8 *Wright, Pa.* 9.

large part of the cases, not all (a matter to be explained in subsequent chapters), a contract is, not void, but voidable, for fraud,<sup>1</sup> infancy,<sup>2</sup> or insanity.<sup>3</sup> The effect of voidable, in each of these instances, is that, for example, a deed conveying lands, or a sale of personal goods accompanied by delivery from the incapable or defrauded person, transmits to the other the seisin or ownership;<sup>4</sup> but, while in all the avoiding of the contract reinvests the seller with the property if it has not passed into the hands of an innocent third person, the effect as to such third person is otherwise in cases of fraud,<sup>5</sup> yet essentially the same in infancy,<sup>6</sup> and insanity.<sup>7</sup> Again,—

§ 160. **Voidable Marriage.**—In matrimonial law, a voidable marriage has, while it remains voidable, the same effect as a perfect one; and it can be avoided only, during the lives of both parties, by a judicial sentence, pronounced in a suit instituted for the very purpose.<sup>8</sup> But,—

§ 161. **Compared with Voidable Contracts—(Ratification).**—Most voidable contracts may, as we shall see in subsequent chapters, be avoided by the mere will of the parties entitled to avoid them. Yet there are some which cannot. Especially in States where the English distinctions between law and equity still prevail, there are some which can be avoided only in an equity proceeding. Generally, a voidable contract, unlike a void one, may be made good by ratification;<sup>9</sup> and probably all such contracts can be, when the proper circumstances concur. But it is believed that

<sup>1</sup> Post, § 198.

<sup>2</sup> Post, § 264, 272.

<sup>3</sup> Post, § 296.

<sup>4</sup> Post, § 199, 264, 267.

<sup>5</sup> Post, § 199.

<sup>6</sup> Post, § 277.

<sup>7</sup> Post, § 297.

<sup>8</sup> 1 Bishop Mar. & Div. § 105.

<sup>9</sup> Matthews *v.* Baxter, Law Rep. 8 Ex. 182; Benedict *v.* National Bank, 4 Daly, 171.

no voidable marriage — using the term voidable in the strict sense of the matrimonial law — can be ratified, except perhaps by judicial decree.<sup>1</sup>

**§ 162. In General.** — These are only illustrations of many different sorts of voidable. But, as the attention of the reader has now been directed to this class of distinctions, and further illustrations will appear at various places throughout this volume, the object of the chapter is accomplished.

**§ 163. *The Doctrine of this Chapter restated.***

There is but one sort of void contract, as the term void is properly employed ; though, improperly, the books sometimes speak of voidable contracts as void. Any contract which has some legal effect, yet which one of the parties or a third person is authorized in law to make void, is termed voidable. But the effect of this contract, and the methods of avoiding it, differ. There are, therefore, many sorts of voidable, yet our language has no words distinguishing them.

<sup>1</sup> See 1 Bishop Mar. & Div. § 113 and note, 115.

## CHAPTER XIII.

## FORMALITIES ATTENDING THE CREATION OF THE CONTRACT.

**§ 164. Oral Contract.**—Where the contract is oral, it, of course, will not necessarily be attended by any formalities; and the proof of it will be guided by rules of evidence, not for discussion here.

**§ 165. Written:**<sup>1</sup>—

**What the Writing.**—A writing, in law, need not be made with the pen, though in most transactions it generally is. If with a lead pencil, it is sufficient.<sup>2</sup> And printed matter, when employed as a writing, is equally good as if done with a pen.<sup>3</sup>

**§ 166. The Signature.**—Almost anything which the parties mean for a signature is such in law; as, if the initials only of the name are written,<sup>4</sup> or if the name is printed.<sup>5</sup> Nor need it be at the foot of the matter which it attests.<sup>6</sup> Such is the strict law; but, practically, the name ought to be at the foot of the matter, written in full.

**§ 167. Whether Signature Necessary.**—The statute of frauds expressly requires the memorandum or contract,

<sup>1</sup> As to contracts under seal, see *ante*, § 14 et seq.

<sup>2</sup> *Geary v. Physic*, 7 D. & R. 653, 5 B. & C. 284; *Reed v. Roark*, 14 Texas, 329; *McDowell v. Chambers*, 1 Strob. Eq. 347; *Lucas v. James*, 7 Hare, 410, 419.

<sup>3</sup> 2 *Bishop Crim. Law*, 6th ed. § 525, 526.

<sup>4</sup> *Palmer v. Stephens*, 1 Denio, 471; *Sanborn v. Flagler*, 9 Allen, 474, 478.

<sup>5</sup> 2 *Bishop Crim. Law*, *ut sup.*; *Commonwealth v. Ray*, 3 Gray, 441; *Schneider v. Norris*, 2 M. & S. 286.

<sup>6</sup> *Knight v. Crockford*, 1 Esp. 190; *Lemayne v. Stanley*, 3 Lev. 1; *Saunders v. Jackson*, 2 B. & P. 238; *Coddington v. Goddard*, 16 Gray, 436, 444.

which is within it, to be signed by the party to be charged; but, in cases governed by the common law, or by a statute silent as to the signing, a signature would not seem to be universally necessary. There are numerous valid writings, not signed, which may be the subjects of forgery.<sup>1</sup> And it would appear that among these may be contracts.<sup>2</sup> Indeed, it has been held that a writing orally assented to by the parties may constitute a contract between them;<sup>3</sup> or, if one signs and the other orally accepts it, both will be bound.<sup>4</sup>

§ 168. **Manner of Signing.**—One signing a contract commonly writes his name with his own hand; but, if another writes it for him in his presence and at his request,<sup>5</sup> or especially if he holds the top of the pen while the other writes it,<sup>6</sup> or makes his mark to his name which the other has written,<sup>7</sup> or if he acknowledges the signature, however made, to be his own,<sup>8</sup> this is sufficient, even in specialties.

§ 169. **Reading at the Signing.**—One is always entitled to read the instrument, or, if illiterate,<sup>9</sup> have it read to him, before signing. But, should he choose to waive this privilege, his signature will bind him, even though he cannot read.<sup>10</sup> Still, if it is fraudulently read to him in terms dif-

<sup>1</sup> 2 Bishop Crim. Law, 6th ed. § 529 et seq.

<sup>2</sup> And see *Selby v. Selby*, 3 Meriv. 2; *Marshall v. Hann*, 2 *Harrison*, 425; *Grove v. Hodges*, 5 *Smith*, Pa. 504; *Paige v. Fullerton Woolen Co.*, 27 *Vt.* 485; *Stearns v. Haven*, 16 *Vt.* 87; *Pooley v. Driver*, 5 *Ch. D.* 458, 468, 469.

<sup>3</sup> *Dutch v. Mead*, 36 *N. Y. Superior*, 427.

<sup>4</sup> *Brandon Manuf. Co. v. Morse*, 48 *Vt.* 322.

<sup>5</sup> *Jansen v. McCahill*, 22 *Cal.* 563; *Frost v. Deering*, 21 *Maine*, 156; *Pierce v. Hakes*, 11 *Harris*, Pa. 231; *Rex v. Longnor*, 1 *Nev. & M.* 576; *Bird v. Decker*, 64 *Maine*, 550.

<sup>6</sup> *Helshaw v. Langley*, 11 *Law J. n. s.* Ch. 17.

<sup>7</sup> *Baker v. Dening*, 8 *A. & E.* 94; *Zimmerman v. Sale*, 3 *Rich.* 76.

<sup>8</sup> *Powell v. Blackett*, 1 *Esp.* 97; *Pequawkett Bridge v. Mathes*, 7 *N. H.* 230; *McIntyre v. Park*, 11 *Gray*, 102; *Rhode v. Louthain*, 8 *Blackf.* 413; *Hill v. Scales*, 7 *Yerg.* 410; *Speckels v. Sax*, 1 *E. D. Smith*, 253; *Hawkins v. Chace*, 19 *Pick.* 502.

<sup>9</sup> *Manser's Case*, 2 *Co. 2 b.*

<sup>10</sup> *Thoroughgood's Case*, 2 *Co. 9 a*; *Chapman v. Rose*, 56 *N. Y.* 187; *Rex v. Longnor*, 1 *Nev. & M.* 576; *School Committee v. Kesler*, 67 *N. C.* 443.

ferent from its real ones, or, not being read, its contents are fraudulently misrepresented, and he cannot himself read or is otherwise without laches, his signature will not bind him.<sup>1</sup>

§ 170. **Intent in the Signing.**—The signing must be done with intent to execute the instrument as a contract, else it will not bind the parties.<sup>2</sup> Hence,—

§ 171. **All the Signatures.**—If by parol,<sup>3</sup> or, *a fortiori*, if by the writing itself,<sup>4</sup> it is disclosed that the contract was not to be deemed complete until other signatures should be attached, it will not bind those who have signed it. But, if nothing of this sort appears, the parties signing will be holden, though even on the face of it the signatures of still others were contemplated by the draughtsman.<sup>5</sup>

§ 172. **Delivery.**—We have seen<sup>6</sup> that a specialty, to be binding, must be delivered. It is the same with a promissory note, or any other written contract.<sup>7</sup>

§ 173. *The Doctrine of this Chapter restated.*

In the absence of a statutory direction, or other special reason, a written contract may be good though it is not formally signed. But the parties must in some way express their consent to be bound by it, and there is no method practically so convenient and easily shown in evidence as by

<sup>1</sup> Ib.; Sims *v.* Bice, 67 Ill. 88; Suffern *v.* Butler, 3 C. E. Green, 220; Green *v.* North Buffalo, 6 Smith, Pa. 110; post, § 192-196.

<sup>2</sup> Grierson *v.* Mason, 60 N. Y. 394; Armstrong *v.* McGhee, Addison, 261; Morrill *v.* Tehama Consolidated Mill, etc., Co., 10 Nev. 125; Ramaley *v.* Leland, 6 Rob. N. Y. 358.

<sup>3</sup> Butler *v.* Smith, 35 Missis. 457.

<sup>4</sup> Wagge man *v.* Bracken, 52 Ill. 468; Sharp *v.* United States, 4 Watts. 21 (which compare with People *v.* Johr, 22 Mich. 461); Bean *v.* Parker, 17 Mass. 591, 605.

<sup>5</sup> Haskins *v.* Lombard, 16 Maine, 140; Webb *v.* Baird, 27 Ind. 368; Adams *v.* Bean, 12 Mass. 137; Cutter *v.* Whittemore, 10 Mass. 442; Hallett *v.* Collins, 10 How. U. S. 174; Scott *v.* Whipple, 5 Greenl. 336; Dillon *v.* Anderson, 43 N. Y. 231.

<sup>6</sup> Ante, § 18.

<sup>7</sup> Burson *v.* Huntington, 21 Mich. 415.

signing. A mark, the recognition of the signature when written by another, the writing of the mere initials of the name,—with pen and ink, a pencil, printers' types, or anything else which will leave a legible impression,—will constitute a signing. If no fraud is practised, it will be valid though not read; but it must be delivered. In some of the States there are statutes which require witnesses to a few special instruments; but, where there is no such statute, a witness adds nothing in legal effect.

## CHAPTER XIV.

## THE MUTUAL ASSENT.

§ 174. **Essential—What it is.**—If one person consents to a thing, and another to a thing in any degree different, so that their wills do not completely coincide, this does not create a contract between them. Each must consent to exactly the same thing to which the other does, and at the same instant of time.<sup>1</sup> For illustration,—

§ 175. **Writing signed.**—If the thing to be done is written, and the parties sign the writing, both do thereby consent to the same thing, at the same instant. Also,—

§ 176. **Proposition accepted.**—If one makes to the other an offer, whether verbally, by letter, or by telegraph, and the offer is of a sort which implies nothing to be done by the latter except to assent or decline, and he accepts it, adding no qualification, here is a mutual consent to the same thing and at the same time. A contract is, in these circumstances, made.<sup>2</sup> Again,—

§ 177. **Offer of Reward, etc.**—If one offers a reward for the doing of a particular thing,—as, for example, the arrest of a person accused of crime,—and another does the thing in a reasonable time, and while the offer is not with-

<sup>1</sup> *Dickinson v. Dodds*, 2 Ch. D. 463, 472; *Cooke v. Oxley*, 3 T. R. 653; *Jordan v. Norton*, 4 M. & W. 155; *Allis v. Read*, 45 N. Y. 142, 149; *Hazard v. New England Marine Ins. Co.*, 1 *Sumner*, 218.

<sup>2</sup> *Wells v. Milwaukee and St. Paul Railway*, 30 Wis. 605; *Abbott v. Shepard*, 48 N. H. 14; *Hart v. Bray*, 50 Ala. 446; *Calhoun v. Atchison*, 4 *Bush*, 261; *Duble v. Batts*, 38 *Texas*, 312.

drawn, here the two minds assent to the same thing at the same time, and the obligation to pay is complete.<sup>1</sup> But—

§ 178. **Offer not accepted.**—A mere offer or promise, not accepted, involves no concurrence of wills, and it can never constitute a contract.<sup>2</sup> Or,—

§ 179. **Imperfect Acceptance.**—Though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations however slight, in time or otherwise, no contract is made.<sup>3</sup>

§ 180. **Offer withdrawn.**—Since an offer is not a contract, the party making it may withdraw it at any time before acceptance.<sup>4</sup> Even though it is in writing, and by its terms is to stand open for a specified period, the result is the same. With no money consideration,<sup>5</sup> and no corresponding promise from the person to whom the offer is made, the promise not to withdraw it has no binding force.<sup>6</sup> If a consideration for the promise to leave the offer open is given and accepted, this constitutes of itself a contract, and the offer cannot be withdrawn.

§ 181. **Methods of Withdrawal.**—If the one who has made the offer disposes, to another person, of the thing to

<sup>1</sup> *Janvrin v. Exeter*, 48 N. H. 83; *Davis v. Munson*, 48 Vt. 676; *Thatcher v. England*, 3 C. B. 254; *Loring v. Boston*, 7 Met. 409, 411; *Tarner v. Walker*, Law Rep. 2 Q. B. 301; *England v. Davidson*, 11 A. & E. 856; *Shuey v. United States*, 92 U. S. 73. See *Babcock v. Raymond*, 2 Hilton, 61.

<sup>2</sup> *Bower v. Blessing*, 8 S. & R. 243; *Bieber v. Beck*, 6 Barr, 198; *McKinley v. Watkins*, 18 Ill. 140; *Esmay v. Gorton*, 18 Ill. 483; *Brown v. Rice*, 29 Misso. 322; *Tuttle v. Love*, 7 Johns. 470; *Demoss v. Noble*, 6 Iowa, 530; *Bruce v. Pearson*, 8 Johns. 534; *Corning v. Colt*, 5 Wend. 258; *Peru v. French*, 55 Ill. 317.

<sup>3</sup> *Rommel v. Wingate*, 108 Mass. 327; *Barrow v. Ker*, 10 La. An. 120; *Belfast, etc., Railway v. Unity*, 62 Maine, 148; *Crossley v. Maycock*, Law Rep. 18 Eq. 180; *Bruner v. Wheaton*, 46 Misso. 363; *Eliason v. Henshaw*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *Moxley v. Moxley*, 2 Met. Ky. 309.

<sup>4</sup> *Cooke v. Oxley*, 3 T. R. 658.

<sup>5</sup> *Cherry v. Smith*, 3 Humph. 19.

<sup>6</sup> *Routledge v. Grant*, 3 Car. & P. 267, 4 Bing. 653; *Dickinson v. Dodds*, 2 Ch. D. 463; *Cheney v. Cook*, 7 Wis. 413.

which it relates, this is a withdrawal ; and he need not expressly notify the other party. It is enough that the latter knows the fact, and perhaps, even if he does not know it, his acceptance during the time limited will be of no avail.<sup>1</sup>

§ 182. **Reasonable Time.**— Though a proposition is not formally withdrawn, still it is not to be construed as open forever. It is limited to a reasonable time. And what is a reasonable time, it appears, will depend on the particular case and its circumstances.<sup>2</sup>

§ 183. **Overt Act of Acceptance.**— A mere determination of the will to accept an offer does not constitute an acceptance ; there must be words, written or spoken, or some other overt act.<sup>3</sup> The doing of a thing pursuant to an offer may be both an acceptance and performance.<sup>4</sup>

§ 184. *The Doctrine of this Chapter restated.*

The entire doctrine is embraced in the simple statement that, to constitute a contract, the wills of the parties must, together with the other elements, simultaneously concur ; each meaning exactly what the other does, both in substance and in form, and at the same moment. The other formalities, however essential, cannot supply the place of this element. Yet, undoubtedly, one who does not in fact concur in his inner purpose may so act as to be estopped to deny that he does. If he employs oral words of contract, or signs his name to written ones, under circumstances justly to induce the belief that he assents, in the other party who

<sup>1</sup> *Dickinson v. Dodds*, 2 Ch. D. 463.

<sup>2</sup> *Loring v. Boston*, 7 Met. 409 ; *Martin v. Black*, 21 Ala. 721 ; *Chicago and Great Eastern Railway v. Dane*, 43 N. Y. 240 ; *Mactier v. Frith*, 6 Wend. 103 ; *McCurdy v. Roger*, 21 Wis. 199.

<sup>3</sup> *White v. Corlies*, 46 N. Y. 467 ; *Trevor v. Wood*, 36 N. Y. 307 ; *Houghwout v. Boisaubin*, 3 C. E. Green, 815.

<sup>4</sup> *Ante*, § 177 ; *Brusle v. Thomas*, 7 La. An. 349 ; *Woodworth v. Wilson*, 11 La. An. 402 ; *Street v. Chapman*, 29 Ind. 142.

acts upon such belief, no mental reservation or undisclosed purpose will prevent his being bound by his own words or signature. But, while we carry this element of contract in our minds, we should not forget the other elements, without which this one, however perfect, will be of no avail.

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## CHAPTER XV.

## FRAUD, MISTAKE, AND DURESS.

§ 185-189. General Principles and Introduction.  
190-227. Fraud.  
228-238. Mistake.  
239-248. Duress.  
249. Doctrine of the Chapter restated.

§ 185. **General Doctrine.**—Though the mutual consent, discussed in the last chapter, is given in form, it may not be in fact; because prevented by fraud, mistake, or duress,—three things similar in nature and consequences. The principle is,—

§ 186. **On what Principle.**—Since, to constitute a contract, each of the parties must mean what the other does, and what the words employed express, and their wills must go with their act, as already explained; if, in any case, the will of one of them is enthralled by fraud or by duress proceeding from the other, or from some third person acting on behalf of the other,—or, even, if what is done comes from an innocent mistake of facts,—so that the outward act of contracting does not truly represent the inward intent, there is no contract. The element of consent is wanting. But this principle, as thus expressed in theoretical form, has its practical limitations; namely,—

§ 187. **By what limited.**—If good faith to an innocent party, or some needful rule of trade, or some other public interest would be violated by permitting one to rely on the defence thus brought to view, he will be estopped<sup>1</sup> from setting it up. Again,—

<sup>1</sup> *Ante*, § 126 et seq.

§ 188. **Ratification.** — Though the consent is thus insufficient at the time when the contract appears to be made, still, the form being then gone through with, a party may afterward, if he chooses, add to it the ratification of his will, when the contract will therefore become complete.<sup>1</sup>

§ 189. **Of the further Discussion — How divided.** — The foregoing sections embrace the whole doctrine of this chapter. Yet, for practical purposes, some minuter views, and views as to how the doctrine is shaped by the courts, are important. We shall consider, I. Fraud ; II. Mistake ; III. Duress.

### I. *Fraud.*

§ 190. **How defined.** — Fraud, of the sort now under discussion, is some spoken or acted falsehood whereby one is induced to believe that a contract which he is executing is a different thing from what it is, or that there is for executing it a motive which does not in truth exist.

§ 191. **Two Objects.** — We see, therefore, that the fraud may have either one of two distinct objects ; namely, first, to seduce its victim into signing, or otherwise formally assenting to, written or spoken words of contract to which he does not understand himself as assenting, and to which he would not in fact assent ; or, secondly, to allure him into an actual assent, which, but for the falsehood, he would not give. This distinction is sometimes ignored or muddled in the books ; but, on the whole, it is sufficiently established in authority, while it is obvious in principle. It is of the utmost practical importance.

§ 192. First. *Luring to a Formal Contracting not meant:* —

**Deceit as to Contents of Writing.** — If, as in cases already mentioned,<sup>2</sup> one is by fraud induced to execute a formal

1 Bishop Mar. & Div., § 189-142, 214, 215; ante, § 161; post, § 206.

Ante, § 169.

contract believing it to be something else, he is not in law bound thereby.<sup>1</sup> Or,—

§ 193. **Deceit in Sale of Goods.**—If one bids at an auction for goods, and they are not the goods which he understands them to be, no contract for their purchase is created, though in form he is declared the purchaser.<sup>2</sup> And—

§ 194. **Void—(Innocent third Person).**—Such a contract is not merely voidable, it is void.<sup>3</sup> Not even innocent third persons can take any benefit from it.<sup>4</sup> This rule is absolute, and without exception. Thus,—

§ 195. **Negotiable Paper.**—Though the law goes far to protect the rights of innocent third persons in negotiable paper which would be valueless as between the original parties, yet bills and notes brought into existence by the fraud now under consideration, and without laches in their makers, are, like forged paper, void as well in the hands of an innocent holder as of the original payee.<sup>5</sup> Negligence in the maker, in putting his name to such paper, will, however, estop him from setting up this defence when sued by a holder who is without fault.<sup>6</sup>

§ 196. **The Principle.**—The reader perceives that, in these cases, there is no consent to what is in form a contract. Hence it can have no effect. Whether the words are oral or written, under seal or not, they are not consented

<sup>1</sup> *Jones v. Austin*, 17 Ark. 498; *Byers v. Daugherty*, 40 Ind. 198; *Laidla v. Loveless*, 40 Ind. 211; *Selden v. Myers*, 20 How. U. S. 506.

<sup>2</sup> *Phillips v. Bistolli*, 2 B. & C. 511.

<sup>3</sup> *Hunter v. Walters*, Law Rep. 7 Ch. Ap. 75, 81; *Stacy v. Ross*, 27 Texas, 3; *Rovegno v. Defferari*, 40 Cal. 459.

<sup>4</sup> *Thoroughgood's Case*, 2 Co. 9 a; *Foster v. Mackinnon*, Law Rep. 4 C. P. 704.

<sup>5</sup> *Kellogg v. Steiner*, 29 Wis. 626; *Whitney v. Snyder*, 2 Lans. 477; *Corby v. Weddle*, 57 Misso. 452; *Munson v. Nichols*, 62 Ill. 111; *Butler v. Carns*, 37 Wis. 61; *Briggs v. Ewart*, 51 Misso. 245; *Woods v. Hynes*, 1 Scam. 103.

<sup>6</sup> *Nebeker v. Cutsinger*, 48 Ind. 436. And see *Foster v. Mackinnon*, Law Rep. 4 C. P. 704; *Spugin v. Traub*, 65 Ill. 170.

to by the party, and, as a contract, are as absolutely null as if they never existed. But, —

§ 197. *Secondly. Fraud in the Inducement to a real Consent:* —

**The Common Case.** — The common case is where the party understands well enough what contract he is making, yet is induced to make it by some falsehood addressed to him as a motive. Here, the reason of the law being different, the rule also is different. Hence, —

§ 198. **Not Void — Voidable.** — Where the party makes the contract he means to, being moved thereto by fraudulent representations, rights vest under it. The other party, who has perpetrated the fraud, cannot take them away. As to him, the contract is perfect. The defrauded party, on discovering the fraud, has his election, where the principles of equity will permit its exercise, to reject the contract ; or, if he will, he can confirm it. Therefore it is not void. The legal term for it is voidable.<sup>1</sup>

§ 199. **Fraudulent Purchase.** — If a purchase of goods is effected by this kind of fraud, the property in them passes, the same as though the seller had not been imposed upon.<sup>2</sup>

§ 200. **Purchase from the Purchaser.** — Then, should a third person, not knowing of the fraud, and not being put on his enquiry,<sup>3</sup> buy them of the fraudulent purchaser for an adequate, valuable consideration, he will hold them ; the title having been, it is seen, in his vendor.<sup>4</sup> Yet, if the

<sup>1</sup> *Oakes v. Turquand*, Law Rep. 2 H. L. 325, 346, 375, 376; *Pearsoll v. Chapin*, 8 Wright, Pa. 9; *Benedict v. National Bank*, 4 Daly, 171; post, § 206.

<sup>2</sup> *Clough v. London and Northwestern Railway*, Law Rep. 7 Ex. 26, 34. The same of land. *Somers v. Pumphrey*, 24 Ind. 281.

<sup>3</sup> *Cooper v. Newman*, 45 N. H. 339.

<sup>4</sup> *Jennings v. Gage*, 18 Ill. 610; *Rowley v. Bigelow*, 12 Pick. 307, 312; *Hoffman v. Noble*, 6 Met. 68; *Sinclair v. Healy*, 4 Wright, Pa. 417; *Sharp v. Jones*, 18 Ind. 314; *Hutchinson v. Watkins*, 17 Iowa, 475. The same rule applies to

third person, when making his purchase, has knowledge of the fraud,<sup>1</sup> or if he receives the goods in payment of a pre-existing debt,<sup>2</sup> or otherwise without consideration,<sup>3</sup> he stands in no better position than the original purchaser. And it is the same with one who attaches them as the first purchaser's, on legal process against him.<sup>4</sup> Again,—

§ 201. **Negotiable Paper.**—Contrary to the rule in the other kind of fraud,<sup>5</sup> a *bona fide* holder of negotiable paper, originally obtained by the fraud now under consideration, may enforce payment against the maker.<sup>6</sup>

§ 202. **Between the Parties.**—As between the parties, the effects of this kind of fraud are less unlike those of the other, still they are different. Theoretically, when the defrauded party elects to avoid the contract, they become the same; but, in some circumstances, there is practically a difference. Thus,—

§ 203. **Rescission.**—The avoiding of a voidable contract is termed rescission. And the party who finds himself defrauded may — it is in general phrase correct to say — rescind the contract if he chooses.<sup>7</sup> But as the rights of

lands. *Collins v. Heaths*, 34 Ga. 443; *Chouteau v. Jones*, 11 Ill. 300; *Scarlett v. Gorham*, 28 Ill. 319; *Bartlett v. Henry*, 10 Johns. 185; *Coleman v. Satterfield*, 2 Head, 259. See post, § 297.

<sup>1</sup> *Crocker v. Crocker*, 31 N. Y. 507; *Shewmake v. Williams*, 54 Ga. 206. And see *Justh v. National Bank of Commonwealth*, 56 N. Y. 478.

<sup>2</sup> *Root v. French*, 18 Wend. 570; *Wood v. Robinson*, 22 N. Y. 564. But see *Shufeldt v. Pease*, 16 Wis. 659; *Butters v. Haughwout*, 42 Ill. 18.

<sup>3</sup> *Wade v. Saunders*, 70 N. C. 270.

<sup>4</sup> *Wiggin v. Day*, 9 Gray, 97; *Hoffman v. Strohecker*, 7 Watts, 86.

<sup>5</sup> *Ante*, § 195.

<sup>6</sup> *Davis v. West Saratoga Building Union*, 32 Md. 285; *Hamilton v. Vought*, 5 Vroom, 187; *Park Bank v. Watson*, 42 N. Y. 490; *Riley v. Schwaecker*, 50 Ind. 592; *Clark v. Thayer*, 105 Mass. 216; *Strough v. Gear*, 48 Ind. 100; *In re Great Western Telegraph*, 5 Bis. 363.

<sup>7</sup> *Dauchy v. Silliman*, 2 Lans. 361; *Gates v. Bliss*, 43 Vt. 299; *Hall v. Fulerton*, 69 Ill. 448; *Holbrook v. Burt*, 22 Pick. 546; *Foster v. Gressett*, 29 Ala. 393; *Cook v. Moore*, 39 Texas, 255.

innocent third persons, acquired for value, cannot be affected thereby,<sup>1</sup> if they have attached he is too late to rescind.<sup>2</sup> Even to the defrauding party he must return, or offer to return, whatever of any value to himself or the other he has received under the contract, but not a thing absolutely worthless and without possible benefit. This is termed placing the parties *in statu quo*.<sup>3</sup> To illustrate,—where worthless lime was sold for good, in casks, it was held that, though the lime was of no importance, the casks must be returned.<sup>4</sup> Moreover,—

§ 204. **Time of Rescission — Notice.** — The language of most of the cases is that the rescission must be prompt, or within a reasonable time after the fraud is discovered ;<sup>5</sup> and, sometimes it is added, with notice to the other party.<sup>6</sup> Doubtless, if anything is to be returned, it should be with a statement of the reason ; but, in other circumstances, no notice in advance of judicial proceedings is universally or even generally required.<sup>7</sup> And in a late English case it was

<sup>1</sup> *Ante*, § 200.

<sup>2</sup> *Oakes v. Turquand*, Law Rep. 2 H. L. 325 ; *ante*, § 200. So in other cases where the parties cannot be placed *in statu quo*. *Potter v. Titcomb*, 22 Maine, 300.

<sup>3</sup> *Post*, § 668 ; *Lane v. Latimer*, 41 Ga. 171 ; *Sanborn v. Batchelder*, 51 N. H. 426 ; *Perley v. Balch*, 23 Pick. 283 ; *Thurston v. Blanchard*, 22 Pick. 18, 20 ; *Beetem v. Burkholder*, 19 Smith, Pa. 249 ; *Underwood v. West*, 52 Ill. 397 ; *Manahan v. Noyes*, 52 N. H. 232. For an exception, see *Clough v. London and Northwestern Railway*, Law Rep. 7 Ex. 26.

<sup>4</sup> *Conner v. Henderson*, 15 Mass. 319.

<sup>5</sup> *Manahan v. Noyes*, 52 N. H. 232 ; *Hall v. Fullerton*, 69 Ill. 448 ; *Oakes v. Turquand*, Law Rep. 2 H. L. 325 ; *Williams v. Ketchum*, 21 Wis. 432 ; *Fratt v. Fiske*, 17 Cal. 380 ; *Barfield v. Price*, 40 Cal. 535 ; *Shaw v. Barnhart*, 17 Ind. 183 ; *Fisher v. Wilson*, 18 Ind. 183 ; *Cook v. Gilman*, 34 N. H. 556 ; *Desha v. Robinson*, 17 Ark. 228 ; *Lawrence v. Dale*, 3 Johns. Ch. 28 ; *Gates v. Bliss*, 43 Vt. 299 ; *Bruce v. Davenport*, 1 Abb. Ap. Dec. 233. But a party is allowed time to enquire into and ascertain his legal rights. *Torrance v. Bolton*, Law Rep. 8 Ch. Ap. 118, 124.

<sup>6</sup> *Beetem v. Burkholder*, 19 Smith, Pa. 249.

<sup>7</sup> *Clough v. London and Northwestern Railway*, Law Rep. 7 Ex. 26, 35, 36 ; *Schofield v. Holland*, 37 Ind. 220 ; *Landauer v. Cochran*, 54 Ga. 533 ; *Thurston v. Blanchard*, 22 Pick. 18.

deemed, that mere delay in rescinding the fraudulent contract does not take away the right, being material only as it furnishes evidence of an election to affirm.<sup>1</sup>

§ 205. **Recover back.** — One who thus rescinds a contract may recover back whatever he has paid or delivered under it, whether money or goods.<sup>2</sup> Again, —

§ 206. **How Ratify.** — Though a defrauded party cannot both rescind a contract and affirm it, he may, as we have seen,<sup>3</sup> elect between the two; and, if he chooses, do the latter. Any act by which, after knowledge of the fraud, he treats the contract as subsisting, will be an affirmation. There can be no rescission afterward.<sup>4</sup> The party in the wrong cannot set up his own fraud;<sup>5</sup> the contract, therefore, is perfected. But, —

§ 207. **Other Remedies for the Fraud.** — Though the contract is thus affirmed, so that it cannot be declared void, or though the right to rescind is defeated by intervening rights of third persons, or because the parties could not be put *in statu quo*, still the law has remedies for the fraud. For example, —

§ 208. **Make the Representation good.** — A court of equity will, if the circumstances allow, compel the defrauding party so to act that his representations shall be realized by the other.<sup>6</sup> As, if partners persuade a third person to become a member of their association, by representing that a certain amount of stock, exceeding the truth, has been

<sup>1</sup> Clough *v.* London and Northwestern Railway, *supra*.

<sup>2</sup> Thurston *v.* Blanchard, 22 Pick. 18; Stevens *v.* Austin, 1 Met. 557; Mann *v.* Stowell, 3 Chand. 243; ante, § 38; post, § 515, and other places.

<sup>3</sup> Ante, § 188, 198.

<sup>4</sup> Cobb *v.* Hatfield, 46 N. Y. 533; Jackson *v.* Jackson, 47 Ga. 99; Evans *v.* Foreman, 60 Misso. 449; Dauchy *v.* Silliman, 2 Lans. 361; Gray *v.* Fowler, Law Rep. 8 Ex. 249; Higgs *v.* Smith, 3 A. K. Mar. 388; Moffat *v.* Winslow, 7 Paige, 124. See post, § 656, 678.

<sup>5</sup> Roberts *v.* Lund, 45 Vt. 82; Jones *v.* Hill, 9 Bush, 692; Fisher *v.* Saylor, 28 Smith, Pa. 84.

<sup>6</sup> Hammersley *v.* Baron de Biel, 12 Cl. & F. 45.

subscribed and paid in, the equity tribunal will see that they personally make good the deficiency.<sup>1</sup> Or —

§ 209. **Damages at Law.** — The defrauded party may recover of the other damages in the proper action at law.<sup>2</sup> Or, —

§ 210. **Relief in Equity.** — In proper circumstances, he may have relief in equity, though the contract is not rescinded.<sup>3</sup> Or, —

§ 211. **Reform.** — In some cases, the court of equity will reform the contract, leaving it to stand in its amended condition.<sup>4</sup> Again, returning to the doctrine of rescission, —

§ 212. **Rescinding in Equity.** — The court of equity will in proper cases order the formal rescinding of the fraudulent contract.<sup>5</sup> And the plaintiff need not have offered, before the bringing of the suit, to restore what had been received.<sup>6</sup>

§ 213. **Defence at Law.** — If one is sued at law, on a contract, and the parties are or can be placed *in statu quo* (and, it would seem from some of the cases, contrary to sound principle and to other cases, even if they cannot), and it has not been affirmed by the defendant, he may in general rely on the fraud as a perfect defence.<sup>7</sup> In other

<sup>1</sup> Moore's Case, Law Rep. 18 Eq. 661; Rawlins *v.* Wickham, 3 De G. & J. 304.

<sup>2</sup> Ward *v.* Wiman, 17 Wend. 193; Coon *v.* Atwell, 46 N. H. 510; Newell *v.* Horn, 45 N. H. 421. See Jackson *v.* Jackson, 47 Ga. 99.

<sup>3</sup> Brizick *v.* Manners, 9 Mod. 284, 285; Holland *v.* Anderson, 38 Miss. 55; Pringle *v.* Samuel, 1 Litt. 43; Moore *v.* Clay, 7 Ala. 742; Miner *v.* Medbury, 6 Wis. 295; Blacks *v.* Catlett, 3 Litt. 139; Stapler *v.* Hurt, 16 Ala. 799.

<sup>4</sup> Ellinger *v.* Crowl, 17 Md. 361; Scott *v.* Duncan, 1 Dev. Eq. 407; Rider *v.* Powell, 4 Abb. Ap. Dec. 63.

<sup>5</sup> Boyce *v.* Grundy, 3 Pet. 210; Hough *v.* Richardson, 3 Story, 659; Fisher *v.* Probart, 5 Hayw. 75; Johnson *v.* Pryor, 5 Hayw. 243; Oswald *v.* McGehee, 28 Miss. 340; Camp *v.* Camp, 2 Ala. 632; Greenlee *v.* Gaines, 13 Ala. 198; Stark *v.* Henderson, 30 Ala. 438; Hall *v.* Perkins, 3 Wend. 626; Moreland *v.* Atchison, 19 Texas, 303; Franklin *v.* Greene, 2 Allen, 519; Wray *v.* Wray, 32 Ind. 126.

<sup>6</sup> Martin *v.* Martin, 35 Ala. 560.

<sup>7</sup> Wyman *v.* Heald, 17 Maine, 329; Cullum *v.* Branch Bank, 4 Ala. 21;

circumstances, the fraud may be relied on in reduction of damages.<sup>1</sup> And the general doctrine is, that, in questions of fraud, courts of equity and courts of law have concurrent jurisdiction.<sup>2</sup> But—

§ 214. **Except—Equity.**—The jurisdictions of equity and law, in fraud, are not in all respects concurrent. And some frauds may be availed of in equity which cannot at law. The authorities are not quite uniform as to where the distinction runs.<sup>3</sup>

§ 215. *What Fraud is sufficient:—*

**Inducement actually moving.**—Whatever falsehood enters into a negotiation, the contract is not impaired thereby unless, in fact, it produced the consent. The presumption is that it did; still, if the representation appears by the evidence to have been known by the other party to be false, or otherwise not believed, or not acted upon, it is without legal effect. To move a court, injury must attend the fraud.<sup>4</sup> Again,—

*Jeter v. Tucker*, 1 S. C. 245; *Wilson v. Cromwell*, 1 Cranch C. C. 214; *Ray v. Virgin*, 12 Ill. 216; *Winslow v. Bailey*, 16 Maine, 319; *Irving v. Thomas*, 18 Maine, 418; *Curtis v. Hall*, 1 Southard, 361; *Block v. Elliott*, 1 Misso. 275; *Pemberton v. Staples*, 6 Misso. 59.

<sup>1</sup> *Jackson v. Jackson*, 47 Ga. 99; *Brown v. North*, 21 Misso. 528.

<sup>2</sup> *Smith v. McIver*, 9 Wheat. 532; 1 Story Eq. Jur. § 184; *Skrine v. Simmons*, 11 Ga. 401; *Turnbull v. Gadsden*, 2 Strob. Eq. 14; *Anderson v. Hill*, 12 Sm. & M. 679; *Tomlin v. Cox*, 4 Harrison, 76; *Gilbert v. Burgott*, 10 Johns. 457.

<sup>3</sup> *Rogers v. Colt*, 1 Zab. 704; *Stryker v. Vanderbilt*, 1 Dutcher, 482; *Wood v. Goodrich*, 9 Yerg. 266 (which cases compare with ante, § 24); *Higgs v. Smith*, 3 A. K. Mar. 388; *McKnight v. Kellett*, 9 Ga. 532; *Willett v. Forman*, 3 J. J. Mar. 292; *Hazard v. Irwin*, 18 Pick. 95; *Burrows v. Alter*, 7 Misso. 424; *Met. Con. 27*; *Denton v. McKenzie*, 1 Des. 289; *Furguson v. Coleman*, 5 Heisk. 378.

<sup>4</sup> *Cunningham v. Shields*, 4 Hayw. 44, 46; *Casey v. Allen*, 1 A. K. Mar. 465; *Meyer v. Yesser*, 32 Ind. 294; *Bailey v. Smock*, 61 Misso. 218; *People v. Cook*, 4 Selden, 67, 79; *Castleman v. Griffin*, 18 Wis. 535; *Anderson v. Burnett*, 5 How. Missis. 165; *Ely v. Stewart*, 2 Md. 408; *Pollock Con.* 480, and English cases cited by him; as *Attwood v. Small*, 6 Cl. & F. 232, 395, 444; *Smith v. Kay*, 7 H. L. Cas. 750, 775, 776; *Horsfall v. Thomas*, 1 H. & C. 90, mentioned in *Smith v. Hughes*, Law Rep. 6 Q. B. 597, 605; *Williams's Case*, Law Rep. 9 Eq. 225, note; *Watson v. Charlemont*, 12 Q. B. 856, 864; and some others.

§ 216. **Relevant to Subject.** — The misrepresentations must relate to the subject of the contract; independent ones, as to some disconnected thing, not being sufficient.<sup>1</sup> Also, —

§ 217. **False.** — What is said must be false. And its falsity, as viewed by the law, will depend, not on the mere words employed, in their literal sense; but on the effect which, in their just interpretation, in connection with the conduct of the defrauding party, and the circumstances, they were adapted to produce on the mind addressed. The literal truth may be a falsehood, because not the whole truth; in which case, and others of the like sort, it will be sufficient on a charge of fraud.<sup>2</sup> Hence —

§ 218. **Concealment.** — The concealment of a fact which one ought, as a legal duty, to disclose, is in law a fraudulent representation.<sup>3</sup>

§ 219. **Continued — Lying in Trade.** — The law, for the purpose, it would seem, of sharpening people's wits,<sup>4</sup> tolerates a good deal of lying in trade, when in the nature of merely puffing one's own goods or depreciating those of another;<sup>5</sup> provided the thing bargained about reveals its own qualities, and is open to the parties' equal inspection.<sup>6</sup> But if there is in a chattel,<sup>7</sup> or in the title to real es-

<sup>1</sup> *Ingram v. Jordan*, 55 Ga. 356. See, also, *Pollock Con.* 484-486.

<sup>2</sup> *Oakes v. Turquand*, Law Rep. 2 H. L. 325, 342, 343; *Mulligan v. Bailey*, 28 Ga. 507; *Denny v. Gilman*, 26 Maine, 149; *Buford v. Caldwell*, 3 Miss. 477.

<sup>3</sup> *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211; *Mitchell v. McDougall*, 62 Ill. 498; *Wintz v. Morrison*, 17 Texas, 372; *Belden v. Henriques*, 8 Cal. 87; *Grove v. Hodges*, 5 Smith, Pa. 504; *Vau Arsdale v. Howard*, 5 Ala. 596; *Barnett v. Stanton*, 2 Ala. 181; *Truebody v. Jacobson*, 2 Cal. 269; *Aortson v. Ridgway*, 18 Ill. 23; *Junkins v. Simpson*, 14 Maine, 364; *McAdams v. Cates*, 24 Miss. 223; *Trigg v. Read*, 5 Humph. 529; *Dickenson v. Davis*, 2 Leigh, 401.

<sup>4</sup> 1 *Bishop Crim. Law*, 6th ed. § 11.

<sup>5</sup> *Met. Con.* 34; *ante*, § 97; *Barlow v. Wiley*, 3 A. K. Mar. 457.

<sup>6</sup> *Hill v. Bush*, 19 Ark. 522; *Bell v. Henderson*, 6 How. Missis. 311; *Armstrong v. Huffstutler*, 19 Ala. 51.

<sup>7</sup> *Turner v. Huggins*, 14 Ark. 21; *Hanks v. McKee*, 2 Litt. 227; *Patterson v. Kirkland*, 34 Missis. 428; *Bigler v. Flickinger*, 5 Smith, Pa. 279.

tate,<sup>1</sup> some defect not open to inspection, the seller should disclose it to one who proposes to buy ; and, if to gain an advantage he forbears to do this, the sale is voidable for the fraud. And the same effect is produced by a fraudulent representation concerning some specific fact, which could be ascertained by examination or enquiry ; if it is positively uttered, and the purchaser relies on it, and consequently forbears to examine or enquire, the transaction becomes voidable for the fraud.<sup>2</sup> The distinction, in such a case, is between positive lying and mere silence ; for, if a fact, or the quality of a thing offered for sale, lies equally within the power of the parties to ascertain, the law does not require the seller to disclose what he knows, though he is informed, and is aware that the other party is not. But often a single positive word will carry the case across the line, and establish fraud.<sup>3</sup> One party is not even required to answer what the other asks ; but, if he does, he must speak truly.<sup>4</sup> Again, —

**§ 220. Fact or Law — Opinion — Promise.** — The misrepresentation must be of some fact ; what is falsely said of the law not being sufficient, unless the parties are in confidential relations. Nor will a misstatement of the speaker's mere opinion, or a mere false promise, render a sale or other contract voidable.<sup>5</sup> Yet, —

<sup>1</sup> *Bryant v. Boothe*, 30 Ala. 311; *Glasscock v. Minor*, 11 Misso. 655; *Hays v. Bonner*, 14 Texas, 629. See *Ward v. Wiman*, 17 Wend. 193; *Moreland v. Atchison*, 19 Texas, 303.

<sup>2</sup> *Venezuela Railway v. Kisch*, Law Rep. 2 H. L. 99; *Lord Ellenborough in Vernon v. Keys*, 12 East, 632, 637; *Hazard v. Irwin*, 18 Pick. 95; *Pringle v. Samuel*, 1 Litt. 43; *Holland v. Anderson*, 38 Misso. 55; *Newell v. Horn*, 45 N. H. 421; *Rosevelt v. Fulton*, 2 Cow. 129; *Litchfield v. Hutchinson*, 117 Mass. 195; *Mead v. Bunn*, 32 N. Y. 275.

<sup>3</sup> *Laidlaw v. Organ*, 2 Wheat. 178; *Dillard v. Moore*, 2 Eng. 166; *Smith v. Hughes*, Law Rep. 6 Q. B. 597; *Harris v. Tyson*, 12 Harris, Pa. 347; *Hobbs v. Parker*, 31 Maine, 143; *Bell v. Byerson*, 11 Iowa, 233.

<sup>4</sup> *Blydenburgh v. Welch*, Bald. 381; *Gartner v. Barnitz*, 1 Yeates, 307; *Kintzing v. McElrath*, 5 Barr, 467; *Butler's Appeal*, 2 Casey, Pa. 63.

<sup>5</sup> *People v. San Francisco*, 27 Cal. 655; *Townsend v. Cowles*, 31 Ala. 428; *Russell v. Branham*, 8 Blackf. 277; *Gatling v. Newell*, 9 Ind. 572; *Sims v.*

**§ 221. Intent not to pay — Misrepresenting Ability — Promise.** — If a man buys goods intending not to pay for them, his contract of purchase is fraudulent though he also promises.<sup>1</sup> So it is if he misrepresents his ability. But if he merely promises, while he knows he cannot pay, there is no legal fraud.<sup>2</sup> Still, —

**§ 222. Deceitful Promise.** — There is a deceitful promise, not meant to be performed, which is deemed a fraud.<sup>3</sup>

**§ 223. Intent — Knowledge of Falsity.** — The fraud which will vitiate a contract is of various sorts; and, in most of the instances arising, it is not one thing, but a combination of things. And as the remedy is civil, not criminal, it need not be such a false pretence as would justify an indictment. Always, therefore, the consideration is important, and it is often the controlling one, that the party knew his representations to be false, if such was the fact;<sup>4</sup> but, on the other hand, if he did not care, or even if he was innocently misinformed, there are many circumstances in which they will be adequate.<sup>5</sup>

Ferrill, 45 Ga. 585; Vernon *v.* Keys, 12 East, 632; Fenwick *v.* Grimes, 5 Cranch C. C. 439; Payne *v.* Smith, 20 Ga. 654; Hall *v.* Thompson, 1 Sm. & M. 443.

<sup>1</sup> Dow *v.* Sanborn, 3 Allen, 181; Wiggin *v.* Day, 9 Gray, 97; Hall *v.* Naylor, 6 Duer, 71; King *v.* Phillips, 8 Bosw. 603; Hoffman *v.* Strohecker, 7 Watts, 86; Mackinley *v.* McGregor, 3 Whart. 369.

<sup>2</sup> Bell *v.* Ellis, 33 Cal. 620; Buffington *v.* Gerrish, 15 Mass. 156; Klopenstein *v.* Mulcahy, 4 Nev. 296; Nichols *v.* Pinner, 18 N. Y. 295; Hennequin *v.* Naylor, 24 N. Y. 189; Backentoss *v.* Speicher, 7 Casey, Pa. 324; Griffin *v.* Chubb, 7 Texas, 603; Powell *v.* Bradlee, 9 Gill & J. 220.

<sup>3</sup> Miller *v.* Howell, 1 Scam. 499; Dowd *v.* Tucker, 41 Conn. 197; Kinard *v.* Hiers, 3 Rich. Eq. 423; Richardson *v.* Adams, 10 Yerg. 273; Farrar *v.* Bridges, 3 Humph. 566.

<sup>4</sup> Hubbell *v.* Meigs, 50 N. Y. 480; Wakeman *v.* Dalley, 51 N. Y. 27; Hall *v.* Bradbury, 40 Conn. 32; Miller *v.* Mutual Benefit Ins. Co., 31 Iowa, 216; Hopper *v.* Sisk, 1 Ind. 176; Campbell *v.* Hillman, 15 B. Monr. 508; Ball *v.* Lively, 4 Dana, 369; McDonald *v.* Trafton, 15 Maine, 225; Stone *v.* Denny, 4 Met. 151.

<sup>5</sup> Stone *v.* Covell, 29 Mich. 359; Frenzel *v.* Miller, 37 Ind. 1; Elder *v.* Allison, 45 Ga. 18; Smith *v.* Richards, 18 Pet. 26; Smith *v.* Babcock, 2 Woodb.

§ 224. **Quantum of the Fraud.** — There is no rule as to how much fraud will be required to avoid a contract. That will depend somewhat on the circumstances, but chiefly on its effect. Did the false representation, and not the valuable consideration which actually passed, or any independent circumstance, operate as the moving cause to the consent? If so, the fraud is adequate.<sup>1</sup> Hence, —

§ 225. **Weak Mind.** — If the mind of the person to whom the fraud was addressed was weak, and especially if it was verging toward insanity, or if he was drunk, that circumstance may render the fraud complete when otherwise it would not be.<sup>2</sup> And —

§ 226. **Ignorant.** — The like consideration applies when the person is ignorant, either generally, or of the particular subject.<sup>3</sup> Also —

§ 227. **Confidential Relations.** — It is the same where the parties are in confidential relations; less of fraud will be required than in other circumstances.<sup>4</sup>

& M. 246; *Foster v. Kennedy*, 38 Ala. 359; *Terhune v. Dever*, 36 Ga. 648; *Harding v. Randall*, 15 Maine, 332; *Bennett v. Judson*, 21 N. Y. 238; *Hubbard v. Briggs*, 31 N. Y. 518, 540; *Bacon v. Bronson*, 7 Johns. Ch. 194; *Donelson v. Young*, 155; *Graves v. Lebanon National Bank*, 10 Bush, 23.

<sup>1</sup> *Duncan v. Hogue*, 24 Missis. 671; *Story v. Norwich*, etc., Railroad, 24 Conn. 94; *Slidell v. Rightor*, 3 La. An. 199; *Peter v. Wright*, 6 Ind. 183; *Central Bank v. Copeland*, 18 Md. 305; *Smith v. Richards*, 13 Pet. 26; *Rhea v. Yoder*, Pr. Dec. 2d ed. 88; *Shackelford v. Hendley*, 1 A. K. Mar. 496.

<sup>2</sup> *Owings' Case*, 1 Bland, 370; *Dodds v. Wilson*, 1 Tread. 448, 3 Brev. 389; *Somes v. Skinner*, 16 Mass. 348, 358; *Neely v. Anderson*, 2 Strob. Eq. 262; *Cadwallader v. West*, 48 Misso. 483; *Cain v. Warford*, 33 Md. 23; *Caloway v. Witherspoon*, 5 Ire. Eq. 128; *Birdsong v. Birdsong*, 2 Head, 289.

<sup>3</sup> *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170; *Nevitt v. Bank of Port Gibson*, 1 Freeman, Missis. 438; *Decker v. Hardin*, 2 Southard, 579; *Smith v. Click*, 4 Humph. 186; *Turner v. Johnson*, 2 Cranch C. C. 287.

<sup>4</sup> *Yosti v. Laughran*, 49 Misso. 594; *Harkness v. Fraser*, 12 Fla. 336; *Shaeffer v. Sleade*, 7 Blackf. 178; *Mullins v. McCandless*, 4 Jones Eq. 425; *Birdsong v. Birdsong*, 2 Head, 289; *Whelan v. Whelan*, 3 Cow. 537; *Conant v. Jackson*, 16 Vt. 335; *Kennedy v. Kennedy*, 2 Ala. 571.

II. *Mistake.*

§ 228. **The Principle.** — A mistake avoids a contract on much the same principle as fraud. If the parties do not mean what they do ; or, if one of them does not, and the circumstances are not such as to estop him to set up his mistake against the other, who is innocent ; there is no assent in fact to what in form is declared between them, and they, or the one not in fault, will not be held to the undertaking.

§ 229. **Void or voidable.** — Whether the contract is to be deemed void or voidable must depend on principles brought to view in our last sub-title, though the question does not seem to admit of entirely the same classification. Yet, —

§ 230. **In the Formal Execution.** — Plainly, if, through mistake as to the terms, or the thing contracted about, the formal agreement is not binding because not what the party meant, it is not merely voidable, but void, — the same rule prevailing here as in fraud.<sup>1</sup> And, —

§ 231. **Want of Consideration.** — If the mistake is such that there is no consideration for the contract, it will be void,<sup>2</sup> like all other simple agreements without consideration. But, —

§ 232. **Voidable.** — In other circumstances, the contract will be voidable only, on principles discussed under the head of fraud. Hence, —

§ 233. **Two Kinds.** — There are two kinds of effect produced by mistake, the same as by fraud.<sup>3</sup>

§ 234. **In the Inducement.** — Mistake in the inducement to the contract is inseparable in principle, and not distin-

<sup>1</sup> *Ante*, § 193, 194.

<sup>2</sup> *Rovengo v. Defferari*, 40 Cal. 459.

<sup>3</sup> And see the distinction stated by Earl, Com. in *Pitcher v. Hennessey*, 48 N. Y. 415, 423.

guished in the books by any distinct line, from the honest misapprehension mentioned under the head of fraud, constituting a fraud in law.<sup>1</sup> Thus,—

§ 235. **Counterfeit Money—Thing not existing.**—An illustration of it occurs where one passes counterfeit money believing it to be good, which, though accepted, is not a payment;<sup>2</sup> or where, contrary to the belief of parties, a thing contracted about does not exist, whereby the contract has no binding force.<sup>3</sup>

§ 236. **Reform in Equity.**—If the parties orally agree to a thing, then reduce their agreement to writing, intending that the writing shall merely express this oral agreement; but, by some mistake of the draughtsman, or their own misapprehension as to the effect of the words employed, or otherwise, the writing, when executed, is found not to contain or mean what both meant, yet still one insists on standing upon its terms; the other may have it reformed, in a court of equity, to express their real agreement, or in proper cases declared void. But, to come within this principle, the mistake must generally be mutual, and it must be clearly established by the proofs, which may be either oral or written.<sup>4</sup> On other principles, the writing, where

<sup>1</sup> *Ante*, § 142; *Phillips v. Hollister*, 2 Coldw. 269; *Cooper v. Phibbs*, Law Rep. 2 H. L. 149.

<sup>2</sup> *Met. Con.* 31.

<sup>3</sup> *Marvin v. Bennett*, 8 Paige, 312.

<sup>4</sup> *Druiff v. Parker*, Law Rep. 5 Eq. 131, 139; *In re De La Touche*, Law Rep. 10 Eq. 599; *White v. White*, Law Rep. 15 Eq. 247; *Huss v. Morris*, 13 Smith, Pa. 367; *Shay v. Pettes*, 35 Ill. 360; *Lyman v. United States Ins. Co.*, 17 Johns. 373; *Clayton v. Bussey*, 30 Ga. 946; *Rogers v. Atkinson*, 1 Kelly, 12; *Greer v. Caldwell*, 14 Ga. 207; *Scales v. Ashbrook*, 1 Met. Ky. 358; *Harrison v. Jameson*, 3 J. J. Mar. 282; *Rigsbee v. Trees*, 21 Ind. 227; *Lanier v. Wyman*, 5 Rob. N. Y. 147; *Evants v. Strode*, 11 Ohio, 480; *Hull v. Cunningham*, 1 Munf. 330; *Argenbright v. Campbell*, 3 Hen. & M. 144; *Waterman v. Dutton*, 6 Wis. 265; *Nevius v. Dunlap*, 33 N. Y. 676; *Proctor v. Thrall*, 22 Vt. 262; *Montville v. Haughton*, 7 Conn. 542; *Garner v. Garner*, 1 Des. 487; *Lanning v. Carpenter*, 48 N. Y. 408; *Schwear v. Haupt*, 49 Misso. 225; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453.

there is a mistake in the motive to it, may be reformed;<sup>1</sup> but there are various distinctions on this subject, obvious in reason, and traceable in the books of equity.

§ 237. **How.** — The reformation is properly on an application to the equity tribunal for the express purpose; but if, in any suit in equity, a contract is set up, the court may reform it.<sup>2</sup> And where, as in some of our States of late, equitable claims and defences are maintainable in suits at law, the court of law may in like manner reform the contract collaterally.<sup>3</sup> But, —

§ 238. **Unchangeable at Law.** — In a court of law, under the common-law rules, though it is always a question whether or not a particular contract in writing has been so executed as to bind the parties;<sup>4</sup> yet, if it has, not what they intended, as explained by parol, but its terms, as interpreted by the court, will prevail; nor can the writing be reformed, though in some circumstances it may be shown to be void for fraud, duress, or mistake.<sup>5</sup> There may, therefore, be contracts, not so imperfect through mistake that the courts of law will pronounce them void, which an equity tribunal will reform; while others, which would be reformed in equity, will be void at law.

### III. *Duress.*

§ 239. **How defined.** — Duress is any unlawful, physical force, applied or threatened to the person of the party, by reason of which he, in form, consents to what he otherwise would not.

§ 240. **Voidable.** — If, therefore, one under duress agrees

<sup>1</sup> *Pitcher v. Hennessey*, 48 N. Y. 415, 424.

<sup>2</sup> *Shelby v. Smith*, 2 A. K. Mar. 504; *Smith v. Allen*, *Saxton*, 43.

<sup>3</sup> *Pitcher v. Hennessey*, 48 N. Y. 415; *Van Dusen v. Parley*, 40 Iowa, 70.

<sup>4</sup> *Ante*, § 170-172; 1 *Greenl. Ev.* § 284.

<sup>5</sup> *Ante*, § 24, 58, 213; *Shankland v. Washington*, 5 Pet. 390, 394; *Caldwell v. May*, 1 *Stew.* 425; *Sanford v. Howard*, 29 *Ala.* 684; *Griswold v. Scott*, 13 *Ga.* 210; *Fits v. Brown*, 20 *N. H.* 393.

to a thing, whether verbally or in writing, the consent is imperfect, and the contract is voidable as already explained.<sup>1</sup> It is not void.<sup>2</sup> Yet,—

§ 241. **Void.**—If he should not really agree to the thing, but sign a writing or employ oral words expressing agreement, because compelled through duress, this would not be voidable. It would be void.

§ 242. **Unlawful—(Judicial Process).**—If one is arrested, imprisoned, or threatened by judicial process, not abused but fairly conducted without malice, this is not duress; and any agreement, otherwise lawful, made to free himself from this, or for any other purpose, is good.<sup>3</sup> But an abuse of process,—as where, for example, it is malicious and without probable cause, or where a lawful imprisonment is carried to an unlawful degree, or, it appears, any other abuse of a sort which the law recognizes,—will be deemed duress, vitiating a contract entered into under its influence.<sup>4</sup> *A fortiori* this is so when the process is void.<sup>5</sup>

§ 243. **Other Forms of Duress.**—Any unlawful imprisonment, actual or threatened, is duress.<sup>6</sup> Such likewise is any threat of bodily harm, reasonably calculated to move the fears.<sup>7</sup>

<sup>1</sup> *Ante*, § 198-201.

<sup>2</sup> *Whelpdale's Case*, 5 Co. 119 *a*; *Veach v. Thompson*, 15 Iowa, 380; *Clark v. Pease*, 41 N. H. 414. See *Loomis v. Ruck*, 56 N. Y. 402.

<sup>3</sup> *Waterman v. Barratt*, 4 Harring, Del. 311; *Bates v. Butler*, 46 Maine, 387; *Holmes v. Hill*, 19 Misso. 159; *Kelley v. Noyes*, 43 N. H. 209; *Eddy v. Herrin*, 17 Maine, 388; *Wilcox v. Howland*, 23 Pick. 167; *Taylor v. Cottrell*, 16 Ill. 93; *Soule v. Bonney*, 37 Maine, 128; *Stebbins v. Niles*, 25 Missis. 267; *Nealey v. Greenough*, 5 Fost. N. H. 325; *Knapp v. Hyde*, 60 Barb. 80; *Kelsey v. Hobby*, 16 Pet. 269; *Smith v. Atwood*, 14 Ga. 402.

<sup>4</sup> *Osborn v. Robbins*, 36 N. Y. 365; *Shaw v. Spooner*, 9 N. H. 197; *Meadows v. Smith*, 7 Ire. Eq. 7; *Breck v. Blanchard*, 2 Fost. N. H. 303; *Stouffer v. Latshaw*, 2 Watts, 165, 167; *Whitefield v. Longfellow*, 18 Maine, 146; *Fay v. Oatley*, 6 Wis. 42; *Cumming v. Ince*, 11 Q. B. 112; *Phelps v. Zuschlag*, 34 Texas, 371.

<sup>5</sup> *Alexander v. Pierce*, 10 N. H. 494.

<sup>6</sup> *Whitefield v. Longfellow*, 13 Maine, 146; *Bowker v. Lowell*, 49 Maine, 429.

<sup>7</sup> *Baker v. Morton*, 12 Wal. 150; *Burr v. Burton*, 18 Ark. 214; *Bosley v. Shanner*, 26 Ark. 280; *Miller v. Miller*, 18 Smith, Pa. 486.

§ 244. **To the Person.** — The duress must be to the person ; and to that of the party, not of another.<sup>1</sup> Also,—

§ 245. **One's Goods.** — It is a general rule that duress of one's goods will not suffice.<sup>2</sup> Plainly, therefore,—

§ 246. **Law Suit.** — The threat of levying an execution, or of a law suit affecting goods,<sup>3</sup> even though the party is in need, and the opposing party is the government,<sup>4</sup> will not constitute duress. Still—

§ 247. **Further as to Law Suits and Goods.** — There are circumstances, not easily arranged and condensed to a rule, and on which the courts are not quite harmonious, wherein the unlawful detention of personal property, or the threat to take it unlawfully, even though under the forms of law, will authorize at least the recovering back of what is paid or given to gain or regain the possession ;<sup>5</sup> or, as a necessary legal consequence, avoid a contract for such payment ;<sup>6</sup> or, in cases of special hardship, operate as general duress, like an unlawful arrest of the person.<sup>7</sup> Of course, a payment to get control again of goods lawfully attached on a just demand cannot be recovered back.<sup>8</sup>

<sup>1</sup> *Robinson v. Gould*, 11 *Cush.* 55, 57 ; *McClintick v. Cummins*, 3 *McLean*, 158 ; *Spaulding v. Crawford*, 27 *Texas*, 155.

<sup>2</sup> *Skeate v. Beale*, 11 *A. & E.* 983, 990 ; *Lehman v. Shackleford*, 50 *Ala.* 437 ; *Bingham v. Sessions*, 6 *Sm. & M.* 18 ; *Hazelrigg v. Donaldson*, 2 *Met. Ky.* 445.

<sup>3</sup> *Mayhew v. Phœnix Ins. Co.*, 23 *Mich.* 105 ; *Miller v. Miller*, 18 *Smith, Pa.* 486 ; *Wells v. Barnett*, 7 *Texas*, 584 ; *Wilcox v. Howland*, 23 *Pick.* 167.

<sup>4</sup> *United States v. Child*, 12 *Wal.* 232, 243.

<sup>5</sup> *Mariposa Co. v. Bowman*, *Deady*, 228 ; *Hendy v. Soule, Deady*, 400 ; *Sartwell v. Horton*, 28 *Vt.* 370 ; *Ogden v. Maxwell*, 3 *Blatch.* 319 ; *People v. Vischer*, 9 *Cal.* 365 ; *Maxwell v. Griswold*, 10 *How. U. S.* 242 ; *Harmony v. Bingham*, 2 *Kernan*, 99 ; *Beckwith v. Frisbie*, 32 *Vt.* 559 ; *Harvey v. Olney*, 42 *Ill.* 336 ; *Laterade v. Kaiser*, 15 *La. An.* 296 ; *Dakota v. Parker*, 7 *Minn.* 267 ; *Chase v. Dwinal*, 7 *Greenl.* 134 ; *Quinnett v. Washington*, 10 *Miss.* 53.

<sup>6</sup> *Bennett v. Ford*, 47 *Ind.* 284 ; *Crawford v. Cato*, 22 *Ga.* 594.

<sup>7</sup> *Collins v. Westbury*, 2 *Bay*, 211 ; *Sasportas v. Jennings*, 1 *Bay*, 470. See *Williams v. Phelps*, 16 *Wis.* 80.

<sup>8</sup> *Kohler v. Wells*, 26 *Cal.* 606. And see *McMillan v. Vischer*, 14 *Cal.* 232 ; *Dickerman v. Lord*, 21 *Iowa*, 338.

§ 248. **Remedies — Consequences.** — The remedies in duress are like those in fraud. So are the consequences.

§ 249. *The Doctrines of this Chapter restated.*

The discussions of this chapter pertain only to voluntary contracts, as distinguished from those which the law creates. Where, as in ordinary circumstances, it is the policy of the law to leave the parties to make a contract or not as they will,—the “will” of each of them must accompany the act, or there is no contract. And, except in cases governed by the rules of estoppel, any form of contract is a mere void thing, and not voidable, where the will of either party is lacking. If both wills consent in fact, yet the will of one of them is lured into the consent by fraud, or conducted to it through mistake, or compelled by duress, then, the will of the other having freely accepted the contract, this one, on his will becoming likewise free, may accept or reject it as he pleases. The other has no election, for his original choice was free and voluntary. Hence this contract, which is good or not as one of the parties may determine, is called voidable.

In the application of these principles, as of any others, the courts look also at such other principles of the law as concern the particular question. If, for example, two persons who know all the facts which concern their interests meet; and one of them tells the other, who believes the tale, that, having walked three times around the latter’s cornfield blowing a fish-horn, the law gives him in compensation three-fourths of the corn; whereupon a bargain is in due form made that the former shall have of the latter the whole crop for a price estimated at one-fourth its value, such bargain is good. And the reason is, because, of necessity, the law is always administered on the basis that every man knows its provisions; so that, though the owner of the corn was

in fact defrauded, there was no fraud in law. The other paid him his own price, and the law binds him to a bargain which, as legally viewed, was fair. But if the cheat had been accomplished by some falsehood as to a fact—as, for example, if the law really were that the blowing of the fish-horn would entitle the one blowing it to the corn, yet the pretence that this one had blown it were false—the conclusion would have been the other way; because, while the law presumes itself to be known to every man, it has no such presumption as to a fact. Truly, therefore, the law of this chapter is such, and such only, as judicial determinations have wrought out, by comparing the simple proposition that people make contracts or not as they choose, with the other established principles of our jurisprudence.

## CHAPTER XVI.

## THE PARTIES REQUIRED.

**§ 250. Contracting with Self.** — One cannot contract with himself.<sup>1</sup> Even —

**§ 251. Different Capacities.** — A man in a fiduciary relation — as, for example, a trustee, or an agent to sell or to buy, or the agent of such an agent, or of such other person — cannot, in this capacity, buy of or sell to, or otherwise deal with, himself in his individual capacity.<sup>2</sup> Again, —

**§ 252. Sue Self.** — One cannot sue himself.<sup>3</sup> Therefore, —

**§ 253. Self and Another.** — If there are more parties than one, he cannot in a common-law court be a plaintiff or defendant on the one side, against himself and another on the other side;<sup>4</sup> nor is the rule different though on the one

<sup>1</sup> *Ante*, § 7.

<sup>2</sup> *Bain v. Brown*, 56 N. Y. 285, 288; *Dutton v. Willner*, 52 N. Y. 312; *Rogers v. Lockett*, 28 Ark. 290; *Ringo v. Binns*, 10 Pet. 269; *Whitcomh v. Minchin*, 5 Madd. 91; *Bent v. Cobb*, 9 Gray, 397; *Michoud v. Girod*, 4 How. U. S. 503; *De Caters v. Le Ray de Chaumont*, 3 Paige, 178; *Child v. Brace*, 4 Paige, 309; *Griffin v. Marine Co.*, 52 Ill. 130; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *Boyd v. Hawkins*, 2 Ire. Eq. 304; *Mathews v. Dragaud*, 3 Des. 25; *Thorp v. McCullum*, 1 Gilman, 614; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Davis v. Simpson*, 5 Har. & J. 147; *Saltmarsh v. Beene*, 4 Port. 288; *Renew v. Butler*, 30 Ga. 954; *Remick v. Butterfield*, 11 Fost. N. H. 70; *Rickey v. Hillman*, 2 Halst. 180; *Wright v. Wright*, 2 Halst. 175; *Sheldon v. Sheldon*, 18 Johns. 220; *Obert v. Hammel*, 3 Harrison, 73; *Bank of Orleans v. Torrey*, 7 Hill, N. Y. 260; *Colden v. Walsh*, 14 Johns. 407; *McCarty v. Van Dalsen*, 5 Johns. 43; *Tynes v. Grimstead*, 1 Tenn. Ch. 508. And see *Armor v. Cochrane*, 16 Smith, Pa. 308.

<sup>3</sup> *Ante*, § 7; *Hoag v. Hoag*, 55 N. H. 172.

<sup>4</sup> *McMahon v. Rauhr*, 47 N. Y. 67; *Moffatt v. Van Mullingen*, 2 Chit. 539.

side he appears in a fiduciary capacity, and on the other side individually.<sup>1</sup> Consequently,—

§ 254. **More than One.**—More parties than one are essential to every contract.

§ 255. **Death.**—One, after he is dead, has no power of contract.<sup>2</sup> For example, a deed to him conveys nothing.<sup>3</sup> But,—

§ 256. **Funeral Expenses.**—Since his body must not lie unburied, if the burial and other funeral arrangements are not made by the executor, any friend may order them, according to the station in life and means of the deceased; then, should the executor come into possession of assets, the law will raise a promise from him, not from the dead man, to pay for them.<sup>4</sup> A *post mortem* examination is not a funeral expense, and not within this rule.<sup>5</sup>

§ 257. **Capacity of Parties.**—The parties must have the legal capacity, not only to enter into the contract, as will be explained in chapters following this, but likewise to do that for which the contract provides.<sup>6</sup> Thus,—

§ 258. **To take.**—A valid conveyance of a thing, or bequest or devise of it,<sup>7</sup> can be made only to one capa-

<sup>1</sup> *McElhanon v. McElhanon*, 63 Ill. 457.

<sup>2</sup> *Bank of Port Gibson v. Baugh*, 9 Sm. & M. 290. There are readers who deem it absurd and puerile for an author to lay down a proposition so simple and obvious. But the more simple and obvious a proposition is, the more apt are some to overlook it. I remember a very good lawyer who advised a widow client, whose husband had once been a partner with persons still living, that she must get them to advertise the dissolution of the firm, to save the deceased or herself harmless from future debts of their contracting! Nor would he be convinced of this error; he persevered in it and still insisted, till the thing, for the sake of peace, had to be done—and it was done!

<sup>3</sup> *Hunter v. Watson*, 12 Cal. 363.

<sup>4</sup> *Tugwell v. Heyman*, 3 Camp. 298; *Shelly's Case*, 1 Salk. 296; *Rodgers v. Price*, 3 Y. & J. 28; *Green v. Salmon*, 8 A. & E. 348; *Brice v. Wilson*, 3 Nev. & M. 512. See *Newcombe v. Beloe*, Law Rep. 1 P. & M. 314.

<sup>5</sup> *Smith v. McLaughlin*, 77 Ill. 596.

<sup>6</sup> *Musselman v. Cravens*, 47 Ind. 1.

<sup>7</sup> *Meade v. Beale*, Taney, 339, 359.

ble in law of being invested with it, and in the particular form.<sup>1</sup>

§ 259. *The Doctrine of this Chapter restated.*

One cannot make a contract with himself alone ; two, at least, are required, and there may be more. It will be valid in law only when the parties are, in law, competent to make it. Whatever their capability in fact may be, they must have legal capacity. They must, at the same time, have capability in fact ; because this is a main element in legal capacity. Indeed, it would be the only element were it not for some technical rules, necessary for the orderly working of the legal system ; such, for example, as that the capability of children shall be conclusively presumed to be incomplete until the full age of twenty-one years is attained.

<sup>1</sup> Holden *v.* Smallbrooke, Vaugh. 187, 199 ; Winslow *v.* Winslow, 52 Ind. 8 ; Methodist Episcopal Church *v.* Hoboken, 4 Vroom, 13 ; The State *v.* Killian, 51 Misso. 80.

## CHAPTER XVII.

## INFANTS.

§ 260. **Who are.**—All persons, male and female, under the age of twenty-one years, are, by the common law, infants. And such is the law in our States generally; but, in a few of them, females are by statute made of age at eighteen.<sup>1</sup>

§ 261. **How the Age computed.**—In the computation, fractions of a day are disregarded, and one day is allowed to the infant; so that a child born during any part of the twenty-four hours of the first of January, counting from midnight, will be of age during the whole of the last day of December, from midnight.<sup>2</sup>

§ 262. **Incapable of Perfect Contract.**—An infant has no complete capacity of contract. The authorities on this subject are in a degree both indistinct and discordant; yet the following propositions harmonize with the general current, and may be deemed on the whole to be sound, at least in principle.

§ 263. **Capacity to receive and hold.**—An infant may receive and hold property, real and personal, the same as

<sup>1</sup> 1 Parsons Con. 294; and the cases cited to the next section.

<sup>2</sup> Co. Lit. 171 b; Bac. Abr. Infancy, A.; Howard's Case, 2 Salk. 625; Fitzhugh *v.* Dennington, 2 Ld. Raym. 1094, 1096; Anonymous, 1 Ld. Raym. 480; Hebert *v.* Turbatt, 1 Keb. 589; 2 Kent Com. 233; Wells *v.* Wells, 6 Ind. 447; Hamlin *v.* Stevenson, 4 Dana, 597; The State *v.* Clarke, 3 Haring. Del. 557. See post, § 749.

an adult;<sup>1</sup> except, perhaps, in cases where it is attended with a burden which may prove prejudicial.<sup>2</sup>

§ 264. **Convey.**—He may convey away his real<sup>3</sup> and personal<sup>4</sup> property, by deed or other suitable form of transfer, if delivery of the property accompanies the act;<sup>5</sup> and the ownership will vest in the transferee, except that, always as to real estate, and in most circumstances as to personal, he may afterward avoid the conveyance.

§ 265. **Executory Promise in Fact.**—Whatever executory undertaking an infant may assume, and though the consideration for it has been paid to him, and he has neither returned nor offered to return it,<sup>6</sup> he will not be compelled to perform such promise.<sup>7</sup> But —

§ 266. **Promise in Law — (Necessaries).**—The law may create a promise by an infant, as well as by an adult; and, when it does,—for example, when necessaries are supplied him,—he may be sued on this promise. Still, as the promise comes from the law, and not from his volition, the sum to be recovered will be the value of the necessaries, not what he agreed to pay for them.<sup>8</sup> Again, —

<sup>1</sup> *Crymes v. Day*, 1 Bailey, 320; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Mears v. Bickford*, 55 Maine, 528; *Spencer v. Carr*, 45 N. Y. 406, 410; *De Levillain v. Evans*, 39 Cal. 120; *Knotts v. Stearns*, 91 U. S. 638; *McClosky v. Cyphert*, 3 *Casey*, Pa. 220; *Taylor v. Mechanics' Savings Bank*, 97 Mass. 340.

<sup>2</sup> *Skinner v. Maxwell*, 66 N. C. 45.

<sup>3</sup> *Irvine v. Irvine*, 9 W. 617; *Spencer v. Carr*, 45 N. Y. 406; *Zouch v. Parsons*, 3 Bur. 1794, 1 W. Bl. 575; 2 Kent Com. 236.

<sup>4</sup> *Baker v. Lovett*, 6 Mass. 78; *Fonda v. Van Horne*, 15 Wend. 681.

<sup>5</sup> *Stafford v. Roof*, 9 Cow. 626.

<sup>6</sup> *Craighead v. Wells*, 21 Misso. 404.

<sup>7</sup> This, being a negative proposition, is consequently not provable affirmatively by the cases; but, I believe, there is no sufficient authority against it. And see *Met. Con.* 42, 48; 1 *Chit. Con.* 11th Am. ed. 194; *Ware v. Cartledge*, 24 Ala. 622; *Hunt v. Peake*, 5 Cow. 475; *Wilt v. Welsh*, 6 Watts, 9; *West v. Gregg*, 1 *Grant*, Pa. 53; *Handy v. Brown*, 1 *Cranch C. C.* 610; *Clark v. Goddard*, 39 Ala. 164; *Vinsen v. Lockard*, 7 *Bush*, 458; *Story v. Pery*, 4 *Car. & P.* 526; *McCoy v. Huffman*, 8 *Cow.* 84; *Dilk v. Keighley*, 2 *Esp.* 480.

<sup>8</sup> *Ante*, § 86, 91. The judges sometimes speak of this contract as an express one, but obviously it is not. And see *Stone v. Dennison*, 18 *Pick.* 1; *Earle v.*

§ 267. **Executed — (Rescission<sup>1</sup>).** — When the contract has been executed, difficulties as to its rescission arise, and the rule of law is somewhat obscure, and not quite uniform. If the parties can be placed *in statu quo*,<sup>2</sup> the infant may return what he received, and take back what he parted with; and, since he is liable like an adult for fraud and other similar wrongs,<sup>3</sup> he cannot, of fraud, have again the one, without restoring the other.<sup>4</sup> Within this principle, if money or other thing is paid him, he cannot recover it over again after becoming of age.<sup>5</sup> The mere repudiating of his agreement is not deemed a legal fraud;<sup>6</sup> and, if he has consumed the consideration of his deed, his inability to restore it will not prevent a disaffirmance.<sup>7</sup>

§ 268. **Contracts not beneficial — (Void).** — Any contract of an infant which, the court can see, cannot in any event be beneficial to him, is in law absolutely void:<sup>8</sup> as, —

§ 269. **Unequal.** — Of this sort is a one-sided agreement, by which the infant is to work a certain time for wages, yet the master may stop the work at pleasure, and retain the wages during the stoppage;<sup>9</sup> or, —

Reed, 10 Met. 387; Hyer *v.* Hyatt, 3 Cranch C. C. 276; Commonwealth *v.* Hantz, 2 Pa. 333; Bouchell *v.* Clary, 3 Brev. 194; Fairmount, etc., Passenger Railway *v.* Stutler, 4 Smith, Pa. 375; Gay *v.* Ballou, 4 Wend. 403; Hyman *v.* Cain, 3 Jones, N. C. 111; Robinson *v.* Weeks, 56 Maine, 102.

<sup>1</sup> And see post, § 275.

<sup>2</sup> See ante, § 203.

<sup>3</sup> Shaw *v.* Cuffin, 58 Maine, 254; School District *v.* Bragdon, 3 Fost. N. H. 507; Oliver *v.* McClellan, 21 Ala. 675; 2 Kent Com. 241.

<sup>4</sup> Kerr *v.* Bell, 44 Misso. 120; Bryant *v.* Pottinger, 6 Bush, 473; Williams *v.* Brown, 34 Maine, 594; Smith *v.* Evans, 5 Humph. 70; Heath *v.* West, 8 Fost. N. H. 101; Riley *v.* Mallory, 33 Conn. 201.

<sup>5</sup> Holmes *v.* Blogg, 2 Moore, 552; Parker *v.* Elder, 11 Humph. 546; Taft *v.* Pike, 14 Vt. 405. See Riley *v.* Mallory, *supra*.

<sup>6</sup> Burns *v.* Hill, 19 Ga. 22.

<sup>7</sup> Green *v.* Green, 7 Hun. 492; Chandler *v.* Simmons, 97 Mass. 508, 514; Bartlett *v.* Drake, 100 Mass. 174, 177; Manning *v.* Johnson, 26 Ala. 446.

<sup>8</sup> Robinson *v.* Weeks, 56 Maine, 102.

<sup>9</sup> Reg. *v.* Lord, 12 Q. B. 757.

§ 270. **Suretyship.**—A contract as surety for another;<sup>1</sup> or,—

§ 271. **Obligation with Penalty.**—An obligation with a penalty.<sup>2</sup> But—

§ 272. **Beneficial—(Voidable).**—Most contracts are such as, on their face, may be beneficial to the infant; and these, and all of which it cannot be said whether they will be or not, are not void but voidable.<sup>3</sup> It is immaterial whether they are in form promissory notes,<sup>4</sup> or other negotiable paper, or an exchange<sup>5</sup> or sale<sup>6</sup> of property, or an agreement to marry,<sup>7</sup> or to go as a mariner on a whaling

<sup>1</sup> *Maples v. Wightman*, 4 Conn. 376. In *Fetrow v. Wiseman*, 40 Ind. 148, an infant's contract of suretyship was held to be voidable only, and therefore capable of ratification on his coming of age. The learned judge who delivered the opinion admitted that it had been adjudged void in various cases, on the ground that it could not be beneficial to the infant. But he deemed the distinction between contracts beneficial and not beneficial to be overturned by the "modern doctrine," which, he said, "may be regarded as settled, that all contracts of an infant, not in themselves illegal, or appointing an agent, are voidable only." Now, if there is a modern doctrine which has discarded this distinction, I submit that it ought itself to be discarded, as a departure, without reason, from established landmarks of the law. The distinction was accepted in England as of full force as late as 1868. *Lumsden's Case*, Law Rep. 4 Ch. Ap. 31, 33, 34. And I have seen no case discarding it there. In Massachusetts, in 1873, the court refused to pronounce an infant's contract of suretyship to be, in "matter of law," "necessarily not beneficial to him," and therefore void; but this was on the express ground that "his contract might be beneficial to him." *Owen v. Long*, 112 Mass. 403, 404. And I submit that there is on this subject no general American doctrine in departure from the ancient and modern English law. Some differences will necessarily occur in the application of this general doctrine, the same as of most others.

<sup>2</sup> *Baylis v. Dineley*, 3 M. & S. 477; *Fisher v. Mowbray*, 8 East, 330.

<sup>3</sup> *Strain v. Wright*, 7 Ga. 568; *Bryan v. Walton*, 14 Ga. 185; *Oliver v. Houdlet*, 18 Mass. 237; *Whitney v. Dutch*, 14 Mass. 457; *Thompson v. Hamilton*, 12 Pick. 425; *Wheaton v. East*, 5 Yerg. 41; *Radford v. Westcott*, 1 Des. 596.

<sup>4</sup> *Young v. Bell*, 1 Cranch C. C. 842; *Buzzell v. Bennett*, 2 Cal. 101; *Wright v. Steele*, 2 N. H. 51; *Reed v. Batchelder*, 1 Met. 559; *Earle v. Reed*, 10 Met. 387.

<sup>5</sup> *Williams v. Brown*, 34 Maine, 594; *Grace v. Hale*, 2 Humph. 27.

<sup>6</sup> *Baker v. Lovett*, 6 Mass. 78; *Edgerton v. Wolf*, 6 Gray, 453; *Stafford v. Roof*, 9 Cow. 626.

<sup>7</sup> *Hunt v. Peake*, 5 Cow. 475; *Cannon v. Alsbury*, 1 A. K. Mar. 76; *Willard v. Stone*, 7 Cow. 22; *Warwick v. Cooper*, 5 Sneed, Tenn. 659.

voyage,<sup>1</sup> or to work on land ;<sup>2</sup> and the same doctrine applies to bonds, deeds, and other specialties as to contracts not under seal.<sup>3</sup> Still a promissory note,<sup>4</sup> for example, or an instrument under seal,<sup>5</sup> may be of a sort to be void, as already explained. Again,—

§ 273. **Infant Feme Covert—(Void—Voidable).**—The deed of an infant *feme covert* is void, not voidable ;<sup>6</sup> but this is because she is a *feme covert*, not because she is an infant. In most of our States, the statutes permit wives to convey their lands by deed executed jointly with their husbands, or sometimes even alone ; therefore such a deed, by an infant *feme covert*, is, the disability of coverture being thus removed, voidable.<sup>7</sup>

§ 274. **Adults contracting with Infants—(As to Void).**—A contract which is void as to the infant is void also as to the adult, neither being bound.<sup>8</sup> But—

§ 275. **As to Voidable.**—A voidable contract is binding on the adult, so long as the infant is in the fulfilment of his

<sup>1</sup> *Vent v. Osgood*, 19 Pick. 572.

<sup>2</sup> *Judkins v. Walker*, 17 Maine, 38 ; *Lowe v. Sinklear*, 27 Misso. 308 ; *Thomas v. Dike*, 11 Vt. 273 ; *Hoxie v. Lincoln*, 25 Vt. 206 ; *Francis v. Felmit*, 4 Dev. & Bat. 498.

<sup>3</sup> *Weaver v. Jones*, 24 Ala. 420 ; *Parsons v. Hill*, 8 Misso. 135 ; *Mustard v. Wohlford*, 15 Grat. 329 ; *Jenkins v. Jenkins*, 12 Iowa, 195 ; *Slaughter v. Cunningham*, 24 Ala. 260 ; *Harrod v. Myers*, 21 Ark. 592 ; *Wallace v. Lewis*, 4 *Harring. Del.* 75 ; *Moore v. Abernathy*, 7 Blackf. 442 ; *Johnson v. Rockwell*, 12 Ind. 76 ; *Chapman v. Chapman*, 13 Ind. 396 ; *Lowe v. Gist*, 5 Har. & J. 106, note ; *Boston Bank v. Chamberlin*, 15 Mass. 220 ; *Kendall v. Lawrence*, 22 Pick. 540 ; *Bool v. Mix*, 17 Wend. 119 ; *Cook v. Toumbs*, 36 Missis. 685 ; *Ferguson v. Bell*, 17 Misso. 347 ; *Cummings v. Powell*, 8 Texas, 80 ; *Fant v. Cathcart*, 8 *Ala.* 725.

<sup>4</sup> *Maples v. Wightman*, 4 Conn. 376.

<sup>5</sup> *Waples v. Hastings*, 3 *Harring. Del.* 403.

<sup>6</sup> *Mackey v. Proctor*, 12 B. Monr. 433 ; *Magee v. Welsh*, 18 Cal. 155 ; *Schrader v. Decker*, 9 Barr, 14 ; *Cronise v. Clark*, 4 Md. Ch. 403 ; *Chandler v. McKinney*, 6 Mich. 217 ; *Adams v. Ross*, 1 Vroom, 505.

<sup>7</sup> 2 *Bishop Mar. Women*, § 515.

<sup>8</sup> *Oliver v. Houdlet*, 13 Mass. 237, 239 ; *Warwick v. Bruce*, 2 M. & S. 205, 206.

part, and does not avoid it.<sup>1</sup> If the infant avoids it without returning the consideration, when it is an article of property capable of being laid hold of, the doctrine ought to be, and it is plainly deducible from foregoing principles,<sup>2</sup> that the adult may retake the article ; as, for example, by a writ of replevin. There is perhaps no sufficient authority for saying that this is established in adjudication.<sup>3</sup>

§ 276. **Time and Manner of Avoiding and Confirming.<sup>4</sup>**

—The cases are obscure and discordant as to what is an avoidance and what a confirmation of a voidable contract, and at what time the one or the other should be made. On principle, and it is believed on satisfactory authority,<sup>5</sup> if the contract is executed, it is good until avoided, because the interest under it has already vested ;<sup>6</sup> and the avoidance may be either before<sup>7</sup> majority or reasonably soon after. It should be by some distinct and positive act, leaving no doubt as to the intent ; but any such act will do. If the contract is executory, so that nothing has vested under it, no act of avoidance is required ; and, to perfect it after majority, it must be confirmed. But any act recognizing its continued existence will suffice. Should the cases ever

<sup>1</sup> *Bruce v. Warwick*, 6 *Taunt.* 118; *Warwick v. Bruce*, 2 *M. & S.* 205; *Nightingale v. Withington*, 15 *Mass.* 272; *Thompson v. Hamilton*, 12 *Pick.* 425; *Holt v. Clarencieux*, *Stra.* 937.

<sup>2</sup> *Ante*, § 267.

<sup>3</sup> See *Badger v. Phinney*, 15 *Mass.* 359; *Skinner v. Maxwell*, 66 *N. C.* 45.

<sup>4</sup> Compare with *ante*, § 267.

<sup>5</sup> *Zouch v. Parsons*, 3 *Bur.* 1794.

<sup>6</sup> *Ante*, § 263, 264.

<sup>7</sup> That it cannot be before majority, see the able argument of Lord Mansfield in *Zouch v. Parsons*, *supra*. His lordship well observes, that the privilege of infancy "is given as a shield and not as a sword," p. 1802. Now, if, at a very immature age, an infant should make a voidable disposition of all his estate for a consideration inadequate in amount, or of a sort not available for his support, then, on becoming older, should discover his folly, but must wait till he was twenty-one years old, and the purchaser had dissipated all, so that no practicable redress could be had, this, it seems to me, would be making the shield perform the service of the sword. I cannot think that such is, or ought to be,

be reconciled, and those which cannot be brought into line with the rest overruled, doubtless these distinctions indicate the way in which it will be done.<sup>1</sup>

**§ 277. Interests vested in Third Person.**—From some doctrines stated in the chapter before the last<sup>2</sup> it might seem to follow, that, if an infant makes a voidable conveyance of his property, real or personal, to one who sells it to a third person without notice and for an adequate consideration, the title will be complete in the latter, and the infant cannot recover it back. If this is so, the way to strip an infant is easy, and the law's protection is valueless. There are cases which hold that the infant may have back again his real estate from an innocent third person, and so much indeed appears to be established;<sup>3</sup> but perhaps he cannot thus

universally the rule. Yet perhaps there may be cases in which the courts should restrain the infant from thus avoiding his voidable contract during minority. No sound reason appears why there may not be a diversity of sorts in the voidable contracts of infants. See *Stafford v. Roof*, 9 Cow. 626.

<sup>1</sup> 1 Chit. Con. 11th Am. ed. 218, 219, and notes; *Irvine v. Irvine*, 9 Wal. 617; *Skinner v. Maxwell*, 66 N. C. 45; *Spencer v. Carr*, 45 N. Y. 406; *Shropshire v. Burns*, 46 Ala. 108; *Robinson v. Weeks*, 56 Maine, 102; *Tucker v. Moreland*, 10 Pet. 58; *Judkins v. Walker*, 17 Maine, 38; *Lowe v. Sinklear*, 27 Misso. 308; *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 Vt. 206, *Zouch v. Parsons*, *supra*, p. 1804; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Phillips v. Green*, 3 A. K. Mar. 7; *Derrick v. Kennedy*, 4 Port. 41; *Jefford v. Ringgold*, 6 Ala. 544; *Thomasson v. Boyd*, 13 Ala. 419; *Phillips v. Green*, 5 T. B. Monr. 344; *Murray v. Shanklin*, 4 Dev. & Bat. 289; *Smith v. Mayo*, 9 Mass. 62, 64; *Ford v. Phillips*, 1 Pick. 202; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Wilcox v. Roath*, 12 Conn. 550; *Goodsell v. Myers*, 3 Wend. 479; *Edgerly v. Shaw*, 5 Fost. N. H. 514; *Millard v. Hewlett*, 19 Wend. 301; *Armfield v. Tate*, 7 Ire. 258; *Reed v. Boshears*, 4 Sneed, Tenn. 118; *Buckner v. Smith*, 1 Wash. Va. 295; *Stokes v. Brown*, 4 Chand. 39; *Whitney v. Dutch*, 14 Mass. 457, 461; *Orvis v. Kimball*, 3 N. H. 314; *Hoit v. Underhill*, 10 N. H. 220; *Emmons v. Murray*, 16 N. H. 385; *Richardson v. Boright*, 9 Vt. 268; *Wright v. Germain*, 21 Iowa, 585; *Deason v. Boyd*, 1 Dana, 45; and multitudes of other cases, in absolute discord.

<sup>2</sup> *Ante*, § 199-201. And see *ante*, § 159.

<sup>3</sup> *Myers v. Sanders*, 7 Dana, 506, 521; *Somers v. Pumphrey*, 24 Ind. 231, 239; *Moore v. Abernathy*, 7 Blackf. 442; *Hovey v. Hobson*, 53 Maine, 451, 456; *Dunbar v. Todd*, 6 Johns. 257; *Hill v. Anderson*, 5 Sm. & M. 216, 224. See *Black v. Hills*, 36 Ill. 376. Compare with *post*, § 297.

have again, from such third person, every kind of property.<sup>1</sup>

**§ 278. Other Points — (What the Law would compel — Fraud — Rescinding Rescission).** — There are some other points, — such as the obvious one that the infant will be bound by any voluntary act which the law would compel;<sup>2</sup> that if, when making a contract, he pretends to be of age, he may still plead infancy against it;<sup>3</sup> that, after he has rescinded a contract, he cannot take back the rescission,<sup>4</sup> — but the foregoing doctrines are the chief and leading ones.

**§ 279. Authorities contradictory.** — Doubtless there is not a word in this chapter which may not be contradicted by something in the books; yet it accords with what, on the whole, may be deemed the current of modern decision.

**§ 280. *The Doctrine of this Chapter restated.***

One is an infant until he attains the age of twenty-one years; which, as the period of freedom from the restraints required for nurture and education, is necessarily arbitrary, yet on the whole just. In natural reason, an intelligent young man who lacks a day only of being twenty-one should not stand on the same footing, as to the power of contract, with a boy of four. And we cannot say affirmatively that he does in law. Indeed, it is plain that he does not. Yet if, in these extremes of age, we can separate the two, we cannot say at what points between, the diversities vary or end. In the criminal law, one under seven years cannot become punishable, and one over fourteen is as liable to punishment as an adult, while between those ages evi-

<sup>1</sup> *Welch v. Welch*, 103 Mass. 562; *Frazier v. Massey*, 14 Ind. 382; *Nightingale v. Withington*, 15 Mass. 272.

<sup>2</sup> *Bavington v. Clarke*, 2 Pa. 115; *Kilcrease v. Shelby*, 23 Missis. 161; *Zouch v. Parsons*, 3 Bur. 1794, 1801.

<sup>3</sup> *Merriam v. Cunningham*, 11 Cush. 40; *Burley v. Russell*, 10 N. H. 184.

<sup>4</sup> *Edgerton v. Wolf*, 6 Gray, 458.

dence of actual capacity may be submitted to the tribunal.<sup>1</sup> In the matrimonial law, a boy and girl of seven may enter into such an "inchoate and imperfect marriage," that, if she becomes a widow at nine, the common law will give her dower; and a boy of fourteen and a girl of twelve may marry as effectually as at their majority, — ages which have been varied by statutes in some of our States.<sup>2</sup> A boy under fourteen, as the law is generally held, cannot become legally guilty of rape, whatever ravishment he may in fact perpetrate.<sup>3</sup> But refinements like these have not been carried into the ordinary law of contracts. The law may bind an infant, like any other person, by a contract to which he does not consent. But the infant cannot, by any consent, bind himself. The books sometimes speak of his doing the latter; but the cases, on being looked into, are found to be those in which the law creates the contract. A contract which cannot be beneficial to the infant is void; that is, it transfers nothing, and it cannot be enforced against either party. One which may be beneficial, even though the court cannot foresee whether it will be or not, binds the adult party, but the infant may avoid it or not at his election. Hence it is termed voidable. Practically, most contracts of infants are found to be of the latter sort.

<sup>1</sup> 1 Bishop Crim. Law, § 368 et seq.

<sup>2</sup> 1 Bishop Mar. & Div., § 143-153.

<sup>3</sup> 2 Bishop Crim. Law, § 1117.

## CHAPTER XVIII.

## MARRIED WOMEN.

§ 281. **Complications of Doctrine.**—The rights and disabilities of married women in the matter of contract are, under the unwritten rule, not the same in courts of law and courts of equity. And they have been greatly changed by statutes, particularly of late. The decisions under the unwritten rule differ somewhat in our various States,—the statutes differ,—the constructions under them are not uniform in the several States or even in the same State at different dates,—there is a mingling, in some of the States, of law and equity, so that the two somewhat contradictory things constitute the rule for decision in one and the same cause. These, and other reasons which might be added, render it impossible to state the powers and disabilities as to contract in any short way, harmonious with these discussions.

§ 282. **Result of Complications.**—These complications do not render the subject intrinsically so difficult as might appear. But they have made it, in another view, a *great* one,—great in the number of decisions, of distinct doctrines, of different blendings of doctrine with doctrine; requiring a careful tracing of lines over long and continuous paths. This work the present writer has done in two volumes on the “Law of Married Women,” and he does not propose to himself the useless attempt at abridgment here.

§ 283. **Importance.**—If the importance of the subject, instead of its intrinsic impossibilities, were considered, this

chapter would be made very full. Scarcely a day passes with any lawyer in practice when he does not have occasion to advise upon it. And he cannot draw the necessary learning from the general fountain of his reading, since its principles are to a considerable extent peculiar. He must, therefore, resort to the discussions of the special topic.

## CHAPTER XIX.

## INSANE PERSONS.

§ 284. **In Brief — (Some Power — Limited).** — Persons who are insane have no complete power of contract. Yet their acts of this sort are not, in general, absolute nullities. To reduce to definite form these two propositions is the object of this chapter.

§ 285. **Name of Insanity — Source.** — The name and source of the insanity are, as respects the discussions of this chapter, immaterial. One who is an idiot,<sup>1</sup> lunatic,<sup>2</sup> or in any other form *non compos mentis*,<sup>3</sup> — in all his faculties, or a monomaniac as to the particular thing,<sup>4</sup> — of intellect in a sufficient degree weak,<sup>5</sup> imbecile from age,<sup>6</sup> or deranged, — is equally incapable of executing a perfectly valid contract. On the other hand, —

<sup>1</sup> *Millison v. Nicholson*, Conference, 499.

<sup>2</sup> *Merritt v. Gumaer*, 2 Cow. 552; *Carr v. Holliday*, 5 Ire. Eq. 167; *Ward v. Kelly*, 1 Ind. 101.

<sup>3</sup> *Taylor v. Dudley*, 5 Dana, 308; *In re Livingston*, 34 N. Y. 555; *Van Deusen v. Sweet*, 51 N. Y. 378.

<sup>4</sup> *Alston v. Boyd*, 6 Humph. 504; *Bond v. Bond*, 7 Allen, 1; *Boyce v. Smith*, 9 Grat. 704.

<sup>5</sup> *Sentance v. Poole*, 3 Car. & P. 1; *Johnson v. Chadwell*, 8 Humph. 145; *Beller v. Jones*, 22 Ark. 92; *McFaddin v. Vincent*, 21 Texas, 47; *Hale v. Brown*, 11 Ala. 87; *James v. Langdon*, 7 B. Monr. 193; *Wilson v. Oldham*, 12 B. Monr. 55; *Owings's Case*, 1 Bland, 370; *Dodds v. Wilson*, 1 Tread. 448; *Somes v. Skinner*, 16 Mass. 348; *Conant v. Jackson*, 16 Vt. 335.

<sup>6</sup> *Coleman v. Frazer*, 8 Bush, 300; *Jeneson v. Jeneson*, 66 Ill. 259; *Keeble v. Cummins*, 5 Hayw. 43; *Parris v. Cobb*, 5 Rich. Eq. 450; *Hinchman v. Emans*, *Saxton*, 100; *Farnam v. Brooks*, 9 Pick. 212, 220.



§ 286. **Lucid Interval.** — A person habitually insane has the power of contract in a lucid interval.<sup>1</sup>

§ 287. **Own Fault — Drunkenness.** — If the insanity proceeded from his own fault,—as, if it is the effect of habitual and long-continued drunkenness,—it is the same as though proceeding from the more direct visitation of God.<sup>2</sup>

§ 288. **As to the Particular Subject.** — In a sort of general way, we say that a man is sane or insane, without enquiring for what particular purpose the insanity is to be set up. But one may be able to dispose of his property judiciously to near friends by a will, yet possess too little intellect to comprehend the relations required for the command of an army. And, in the law, a person is not unfrequently deemed to have capacity to do one binding act, yet not another.<sup>3</sup>

§ 289. **Insanity as to Contracts defined.** — In the law of contracts, insanity is such disease, weakness, or other imperfection or derangement of the mind as disqualifies it, when entering into the form of a contract,<sup>4</sup> to comprehend the subject of it, and its nature and probable consequences.<sup>5</sup> Hence —

§ 290. **Degree and Kind.** — There may be delusions, on independent subjects, not adequate to impair a contract.<sup>6</sup>

<sup>1</sup> *Toser v. Saturlee*, 3 Grant, Pa. 162; *Jones v. Perkins*, 5 B. Monr. 222; *Hall v. Warren*, 9 Ves. 605; *Lilly v. Waggoner*, 27 Ill. 395.

<sup>2</sup> *Bliss v. Connecticut*, etc., Railroad, 24 Vt. 424; *Menkins v. Lightner*, 18 Ill. 282.

<sup>3</sup> 1 *Bishop Mar. & Div.* § 126-128; *Howard v. Coke*, 7 B. Monr. 655; *Converse v. Converse*, 21 Vt. 168; *Kinne v. Kinne*, 9 Conn. 102; *Stubbs v. Houston*, 33 Ala. 555; *Hall v. Hall*, 18 Ga. 40; *Gaither v. Gaither*, 20 Ga. 709.

<sup>4</sup> *Lewis v. Baird*, 3 McLean, 55; *Beckwith v. Butler*, 1 Wash. Va. 224; *Jenners v. Howard*, 6 Blackf. 240.

<sup>5</sup> *Lozear v. Shields*, 8 C. E. Green, 509; 1 *Chit. Con.* 11th Am. ed. 185; *Bond v. Bond*, 7 Allen, 1, 8; *Brown v. Brown*, 108 Mass. 386; *Henderson v. McGregor*, 30 Wis. 78; *Musselman v. Cravens*, 47 Ind. 1.

<sup>6</sup> *Lozear v. Shields*, 8 C. E. Green, 509.

To have this effect, they, or the imbecility, or derangement, must be such as to cover the particular matter of the contract, and be sufficient in degree to come within the definition just given.<sup>1</sup>

**§ 291. Insanity prompting the Contract or not.**—Whatever be the theories of medical experts, there are persons who, to common observation, are neither completely insane nor completely sane. Many or most of their acts appear to be both rational in themselves and prompted by the normal faculties, while, in others, the mind is perhaps more or less clouded. The law recognizes this, which common observation discloses; and, where the mental disorder is not far advanced or of a positive character, looks at the nature of the contract, and the influences leading to it, in determining whether or not it should be sustained. Is it fair and just? Was the consideration adequate? Did the other party know of the mental derangement? Did he seek any advantage in consequence of such knowledge? Was undue influence used—is there any taint of fraud? Did the person alleged to be insane have any friendly advice, and what was its nature, and from whom? Enlightened by the answers to questions like these, as well as those which bear more directly on the mental condition, the court or jury are to determine whether the contract was the offspring of insanity, or of the competent, normal mind. If the former, it is ill; if the latter, it is good.<sup>2</sup>

<sup>1</sup> *Hovey v. Hobson*, 55 Maine, 256; *Miller v. Craig*, 36 Ill. 109; *Speers v. Sewell*, 4 Bush, 239; *Hovey v. Chase*, 52 Maine, 304; *Dennett v. Dennett*, 44 N. H. 531; *Odell v. Buck*, 21 Wend. 142; *Osterhout v. Shoemaker*, 3 Hill, N. Y. 513; *Rippy v. Gant*, 4 Ire. Eq. 443; *Samuel v. Marshall*, 3 Leigh, 567; *Smith v. Elliott*, 1 Pat. & H. 307; *Farnam v. Brooks*, 9 Pick. 212; *Somes v. Skinner*, 16 Mass. 348, 358; *Siemon v. Wilson*, 3 Edw. Ch. 36; *Smith v. Beatty*, 2 Ire. Eq. 456.

<sup>2</sup> See and compare *ante*, § 225-227; *Wray v. Wray*, 32 Ind. 126; *Jeneson v. Jeneson*, 66 Ill. 259; *Behrens v. McKenzie*, 23 Iowa, 333; *Waters v. Barral*, 2 Bush, 598; *Owings's Case*, 1 Bland, 370; *Jones v. Perkins*, 5 B. Monr. 222; *Holland v. Miller*, 12 La. An. 624; *Dodds v. Wilson*, 1 Tread. 448, 3 Brev. 389;

§ 292. **Executory or Executed.**—It is believed that no mere executory contract, which proceeded from an insane mind, is binding on the insane person.<sup>1</sup> But,—

§ 293. **Created by Law.**—As we have seen,<sup>2</sup> where necessaries are furnished to such a person, and perhaps in some other cases of *executed* contracts, where a benefit is actually conferred (not where it is not<sup>3</sup>), the law will create a promise from him to pay what the benefit is reasonably worth.<sup>4</sup> And,—

§ 294. **Knowledge of the Insanity.**—In considering questions of the sort last mentioned, it is sometimes deemed a material circumstance that the sane person contracting with the insane one did not know of the insanity.<sup>5</sup> Yet in strict law, at least by the better doctrine, this is never absolutely controlling; for, if insanity exists, though unknown to the other, and the case is not one of a contract created by law, it is not binding.<sup>6</sup>

§ 295. **Allege own Insanity — Rescission.**—Contrary to a doctrine formerly held by the courts, it is the modern law that a party may set up his own insanity to avoid a con-

Hinchman *v.* Emans, 100; Neely *v.* Anderson, 2 Strob. Eq. 262; Conant *v.* Jackson, 16 Vt. 335; Keeble *v.* Cummins, 5 Hayw. 43; Parris *v.* Cobb, 5 Rich. Eq. 450; McFaddin *v.* Vincent, 21 Texas, 47; Hale *v.* Brown, 11 Ala. 87; James *v.* Langdon, 7 B. Monr. 198; Wilson *v.* Oldham, 12 B. Monr. 55; Johnson *v.* Johnson, 10 Ind. 387; Nicl *v.* Morley, 9 Ves. 478; Evans *v.* Blood, 3 Bro. P. C. 632; Sergeson *v.* Sealy, 2 Atk. 412; s. c. nom. Sergison *v.* Sealey, 9 Mod. 370; Clerk *v.* Clerk, 2 Vern. 412, 414; Stockley *v.* Stockley, 1 Ves. & B. 23; Osmond *v.* Fitzroy, 3 P. Wms. 129.

<sup>1</sup> 1 Chit. Con. 11th Am. ed. 191; Musselman *v.* Cravens, 47 Ind. 1; Rice *v.* Peet, 15 Johns. 503; Fitzgerald *v.* Reed, 9 Sm. & M. 94; Crowther *v.* Rowlandson, 27 Cal. 376; Maddox *v.* Simmons, 31 Ga. 512; Burke *v.* Allen, 9 Fost. N. H. 106.

<sup>2</sup> Ante, § 85.

<sup>3</sup> Lincoln *v.* Buckmaster, 32 Vt. 652.

<sup>4</sup> And see Carr *v.* Holliday, 5 Ire. Eq. 167; Kendall *v.* May, 10 Allen, 59.

<sup>5</sup> Behrens *v.* McKenzie, 23 Iowa, 333; Succession of Smith, 12 La. An. 24; Carr *v.* Holliday, 1 Dev. & Bat. Eq. 344; Molton *v.* Camroux, 2 Exch. 487, 4 Exch. 17; Beavan *v.* McDonnell, 9 Exch. 309.

<sup>6</sup> Seaver *v.* Phelps, 11 Pick. 304; Hovey *v.* Hobson, 53 Maine, 451, 453.

tract.<sup>1</sup> Nor, though the contract is executed, is it always necessary that, in avoiding it, he should return the consideration.<sup>2</sup>

**§ 296. Void or Voidable — Conveys Seisin, etc.** — There are cases which seem to hold, or in which the judges incautiously state the doctrine to be, that, where a contract is impeachable for insanity, it is absolutely void.<sup>3</sup> And perhaps there may be circumstances in which this is so by the better doctrine.<sup>4</sup> If the insanity is complete and profound, the law ought, in reason and justice, to be so held. But in most of the cases the insanity is, on the facts, only partial; and the contract is generally adjudged to be merely voidable by the insane person or his legal representatives; and, while not so avoided, binding on the other party. It may be ratified by the insane person on his restoration to reason. But, before ratification, if, for example, it is a deed of real estate, it conveys a seisin to the grantee.<sup>5</sup>

**§ 297. Innocent Third Persons.** — We have seen,<sup>6</sup> that, where a contract is voidable for fraud in the inducement to it, if it becomes executed by a conveyance to the defrauding party, then this party for a full consideration conveys the thing to a third person ignorant of the fraud, the title is thereby perfected in the latter, and he cannot be divested

<sup>1</sup> *Seaver v. Phelps*, 11 Pick, 304; *Rice v. Peet*, 15 Johns. 503; *Ballew v. Clark*, 2 Ire. 23; *Bensell v. Chancellor*, 5 Whart. 371; *Morris v. Clay*, 8 Jones, N. C. 216; *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 N. H. 435; *Thorn-ton v. Appleton*, 29 Maine, 298; *Tolsons v. Garner*, 15 Misso. 494.

<sup>2</sup> *Gibson v. Soper*, 6 Gray, 279; *Foss v. Hildreth*, 10 Allen, 76, 80.

<sup>3</sup> *Ante*, § 157.

<sup>4</sup> *Van Deusen v. Sweet*, 51 N. Y. 378; *Marvin v. Lewis*, 61 Barb. 49; *Burke v. Allen*, 9 Fost. N. H. 106.

<sup>5</sup> *Matthews v. Baxter*, Law Rep. 8 Ex. 132; *Allis v. Billings*, 6 Met. 415; *Merritt v. Gumaer*, 2 Cow. 552; *Crouse v. Holman*, 19 Ind. 30; *Breckenridge v. Ormsby*, 1 J. J. Mar. 236; *Somers v. Pumphrey*, 24 Ind. 231; *Cates v. Woodson*, 2 Dana, 452; *Hovey v. Hobson*, 53 Maine, 451; *Arnold v. Richmond Iron Works*, 1 Gray, 484; *Ingraham v. Baldwin*, 5 Selden, 45.

<sup>6</sup> *Ante*, § 198-201.

of it. If we look for the true reason why, when a man has but a voidable title, he can make, what he has not, a complete one in his grantee, we shall probably find it in the equitable view that he who suffered his own weakness to be imposed upon, and was therefore in a measure to blame, should bear a loss rather than the meritorious third person who was clear of every fault.<sup>1</sup> In a case of insanity, the considerations are reversed. To the insane person, not even carelessness can be attributed. And the third person was in a degree careless ; because, insanity being usually a permanent condition, he could ascertain its existence by enquiry, as a third person could not a fraud. Therefore the rule ought to be, that, if real estate, for example, has by the deed of an insane man passed to a grantee who has conveyed it to a third person, though for its full value, and without notice, this third person should have a mere defeasable seisin, like his grantor's. And so it is held.<sup>2</sup>

§ 298. **Statutory Guardianships, etc.**—The foregoing sections relate to cases in which the insane person is not under guardianship or a commission of lunacy. There are in our States differing statutory regulations on this subject, not to be considered here.

§ 299. *The Doctrine of this Chapter restated.*

Like an infant, an insane person cannot bind himself by a contract ; though, in some circumstances, the law will bind him. But, as one may be insane, yet not ordinarily appear so, or only partially insane, and practically have the care of himself and his affairs, it is generally not unjust that

<sup>1</sup> See Rawls *v.* Deshler, 4 Abb. Ap. Dec. 12.

<sup>2</sup> Hovey *v.* Hobson, 53 Maine, 451 ; Somers *v.* Pumphrey, 24 Ind. 231, 238. See Cates *v.* Woodson, 2 Dana, 452 ; ante, § 180 ; Fuentes *v.* Montis, Law Rep. 3 C. P. 268, 276, 277 ; Cole *v.* Northwestern Bank, Law Rep. 10 C. P. 354, 362, 363.

a sound-minded person, who enters into a formal contract with such a person, should be bound thereby. And the insane person ought to have the benefit of such a contract, should it be beneficial to him. Now, if the law were to hold the contract void, the sane party would not be bound by it, nor could the insane take under it any benefit.<sup>1</sup> Consequently, and justly, the law generally holds the contract in such circumstances to be voidable, — the insane party may avoid it ; but, if he does not, it binds the sane. Yet, when it is avoided, the avoidance, like an infant's of his contract, operates more strongly against an innocent third person than the avoidance, by a party defrauded, does of the fraudulent contract.

<sup>1</sup> *Ante*, § 155, 156, 274.

## CHAPTER XX.

## DRUNKEN PERSONS.

§ 300. **When, cannot contract.** — Intoxication in a contracting party, like insanity, renders the contract imperfect, when so deep as to take away the agreeing mind.<sup>1</sup> But, —

§ 301. **Degree — Sober Interval.** — If it is less in degree, the contract is not made invalid by it, though the party is a drunkard.<sup>2</sup> And even where his drunkenness has become habitual, his contract is good if made in a sober interval.<sup>3</sup>

§ 302. **Making Drunk.** — For drunkenness to produce the effect thus stated, the party need not be made drunk by the other.<sup>4</sup> But a less degree will suffice where it is produced by the artifice of the other party, to gain an undue advantage; for then fraud mingles with it.<sup>5</sup> So —

§ 303. **Undue Advantage.** — Undue advantage taken of a drunken man may render void a contract which, if he were sober, would be good.<sup>6</sup>

<sup>1</sup> 1 Bishop Mar. & Div. § 181; 2 Kent Com. 451, 452; Pitt *v.* Smith, 3 Camp. 38; Fenton *v.* Holloway, 1 Stark. 126; Dulany *v.* Green, 4 Harring. Del. 285; Drummond *v.* Hopper, 4 Harring. Del. 327; Cummings *v.* Henry, 10 Ind. 109; Berkley *v.* Cannon, 4 Rich. 136; Johns *v.* Fritchey, 39 Md. 258; Williams *v.* Inabnet, 1 Bailey, 343; Wilson *v.* Bigger, 7 Watts & S. 111.

<sup>2</sup> Pickett *v.* Sutter, 5 Cal. 412; Woods *v.* Pindall, Wright, Ohio, 507; Belcher *v.* Belcher, 10 Yerg. 121; Morris *v.* Nixon, 7 Humph. 579; Lightfoot *v.* Heron, 8 Y. & Col. Ex. 586; Hutchinson *v.* Brown, Clarke, N. Y. 408; Henry *v.* Ritenour, 31 Ind. 186; Reinicker *v.* Smith, 2 Har. & J. 421; Caulkins *v.* Fry, 35 Conn. 170, 172.

<sup>3</sup> Ritter's Appeal, 9 Smith, Pa. 9.

<sup>4</sup> Donelson *v.* Posey, 13 Ala. 752; Freeman *v.* Staats, 4 Halst. Ch. 814; French *v.* French, 8 Ohio, 214; Wigglesworth *v.* Steers, 1 Hen. & M. 70.

<sup>5</sup> Say *v.* Barwick, 1 Ves. & B. 195.

<sup>6</sup> Henry *v.* Ritenour, 31 Ind. 186; Burroughs *v.* Richman, 1 Green, N. J. 233;

§ 304. **Voidable — Ratify.** — The contract is not void, but voidable, and it may be ratified by the party when sober.<sup>1</sup>

§ 305. **How ratify.** — One method of ratification is to keep the consideration received.<sup>2</sup>

§ 306. *The Doctrine of this Chapter restated.*

Drunkenness, carried to a sufficient degree, operates, in civil jurisprudence, as a sort of insanity. In the criminal law, it is regarded in the nature of a crime ; so that, if a man wilfully makes himself drunk, then commits an act of wrong of the class which is indictable when done from general malevolence not requiring a specific criminal intent, he is punishable the same as though he were sober.<sup>3</sup> But this doctrine has no application in the law of contracts. Or, exactly, a contract requires a specific intent, — a determination of the mind to enter into the particular agreement which the words express. Consequently the party would not be bound even under the rules of the criminal law. The reasons mentioned under the title insanity<sup>4</sup> show that the drunkard's contract, when not valid, must generally be — and so the courts hold it — voidable, and not void.

*Birdsong v. Birdsong*, 2 Head, 289 ; *Mansfield v. Watson*, 2 Iowa, 111 ; *White v. Cox*, 3 Hayw. 79.

<sup>1</sup> *Matthews v. Baxter*, Law Rep. 8 Ex. 132. See *Caulkins v. Fry*, 35 Conn. 170.

<sup>2</sup> *Williams v. Inabnet*, 1 Bailey, 343 ; *Joest v. Williams*, 42 Ind. 565. But see *Reinskoff v. Rogge*, 37 Ind. 207.

<sup>3</sup> 1 Bishop Crim. Law, § 897-416.

<sup>4</sup> *Ante*, § 299.

## CHAPTER XXI.

## CORPORATIONS.

**§ 307. Power of Contract.**—The powers of a corporation come solely from its charter, or incorporating act; being either expressed therein, or implied.<sup>1</sup> And as individuals cannot live without continually entering into contracts, so cannot a corporation. Therefore,—

**§ 308. When implied.**—If the power of contract is not specially given to a corporation, it is always, to some extent, implied; and, if it is given, but not in adequate measure, the deficiency may be made up from implication.<sup>2</sup>

**§ 309. Extent of Implication.**—At common law, a corporation has, within its sphere, the same power of making contracts as a natural person.<sup>3</sup> Therefore, though the books contain some intimations that, to justify a contract through a power implied, it must be necessary to the carrying out

<sup>1</sup> *Head v. Providence Ins. Co.*, 2 Cranch, 127; *Beaty v. Knowler*, 4 Pet. 152; *Straus v. Eagle Ins. Co.*, 5 Ohio State, 59; *White's Bank v. Toledo Ins. Co.*, 12 Ohio State, 601; *McMasters v. Reed*, 1 Grant, Pa. 36; *Burr v. McDonald*, 3 Grat. 215; *Madison*, etc., *Plank Road v. Watertown*, etc., *Plank Road*, 5 Wis. 173; *Weckler v. First National Bank*, 42 Md. 581; *Matthews v. Skinner*, 62 Misso. 329.

<sup>2</sup> *People v. Mauran*, 5 Denio, 389; *Blanchard's Gun-stock Turning Factory v. Warner*, 1 Blatch. 258; *Bennington Iron Co. v. Rutherford*, 3 Harrison, 467; *Moss v. Averell*, 6 Selden, 449; *Cincinnati*, etc., *Railroad v. Clarkson*, 7 Ind. 595; *Abbott v. Baltimore*, etc., *Steam Packet*, 1 Md. Ch. 542; *Reynolds v. Stark*, 5 Ohio, 204; *Barry v. Merchants' Exchange*, 1 Sandf. Ch. 280. Whether or not the cases cited come fully up to supporting the latter clause in the text, it is plainly correct in principle; for, otherwise, a part of the act of incorporation would be rendered practically null.

<sup>3</sup> *Riche v. Ashbury Railway Carriage*, etc., Co., Law Rep. 9 Ex. 224, 264; and cases in the last note.

of express powers, such is not the true rule;<sup>1</sup> but, if the subject of the contract is within the corporate sphere, and the contract itself is such as an individual might make, it will be good. Thus,—

§ 310. **Take and convey.**—A corporation may, within its sphere, take and convey real estate and other property;<sup>2</sup> but not outside of its general power and purposes.<sup>3</sup> So—

§ 311. **Negotiable Paper.**—Corporations, acting within their sphere, not otherwise, may issue and receive negotiable paper.<sup>4</sup> Also—

§ 312. **Appoint Agent.**—They may appoint an agent and provide for his compensation.<sup>5</sup> Also—

§ 313. **Borrow — Mortgage.**—They may borrow money<sup>6</sup> and mortgage their property to secure their debts.<sup>7</sup>

§ 314. *Mode of contracting:*—

**When prescribed in Charter.**—When corporations have prescribed to them in their charters “a mode of contracting, they must,” said Marshall, C. J., “observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.”<sup>8</sup> This is perhaps generally

<sup>1</sup> Met. Con. 156.

<sup>2</sup> Sutton’s Hospital, 10 Co. 23 *a*, 80 *b*; Blanchard’s Gun-stock Turnping Factory *v.* Warner, 1 Blatch. 258; Barry *v.* Merchants’ Exchange Co., 1 Sandf. Ch. 280; Phillips Academy *v.* King, 12 Mass. 546; Rehoboth *v.* Rehoboth, 23 Pick. 189; Bennington Iron Co. *v.* Rutherford, 3 Harrison, 467; Leazure *v.* Hillegas, 7 S. & R. 313, 320; Buell *v.* Buckingham, 16 Iowa, 284; Indiana *v.* Woram, 6 Hill, N. Y. 33.

<sup>3</sup> Lynch *v.* Hartwell, 8 Johns. 422; Occum Co. *v.* Sprague Manuf. Co., 34 Conn. 529; First Parish in Sutton *v.* Cole, 3 Pick. 232.

<sup>4</sup> Met. Con. 158; Attorney General *v.* Life and Fire Ins. Co., 9 Paige, 470; Moss *v.* Averell, 6 Selden, 449; Ketchum *v.* Buffalo, 4 Kernan, 156; Goodrich *v.* Reynolds, 31 Ill. 490; Hardy *v.* Merriweather, 14 Ind. 208; Came *v.* Brigham, 39 Maine, 35; Bacon *v.* Mississippi Ins Co., 31 Missis. 116; Moss *v.* Oakley, 2 Hill, N. Y. 265; McCullough *v.* Moss, 5 Denio, 567; *In re* Great Western Telegraph, 5 Bis. 363.

<sup>5</sup> Cincinnati, etc., Railroad *v.* Clarkson, 7 Ind. 595; Berks and Dauphin Turnpike Road *v.* Myers, 6 S. & R. 12, 16.

<sup>6</sup> Union Gold Mining Co. *v.* Rocky Mt. Nat. Bank, 2 Col. T. 248.

<sup>7</sup> Gordon *v.* Preston, 1 Watts, 385; People *v.* Brown, 5 Wend. 590.

<sup>8</sup> Head *v.* Providence Ins. Co., 2 Cranch, 127, 169.

so;<sup>1</sup> but sometimes a provision of the sort is construed as directory only,<sup>2</sup> and contracts not in the prescribed mode are held to be valid.<sup>3</sup> But,—

§ 315. **When not prescribed—(Under Common Seal, or not).**—When the form is not prescribed in the charter, it is the American doctrine, contrary in part to the English, that a corporation can make any contract within its power in the same manner as a natural person would do.<sup>4</sup> If it is required by the general laws to be by deed under seal, it must be under the common seal of the corporation affixed by one authorized.<sup>5</sup> But where a parol contract would be valid if made by a natural person, the corporation may contract by parol.<sup>6</sup> Within this principle it may, without seal, make a binding contract in writing to sell real estate.<sup>7</sup> And—

§ 316. **Implied.**—Contracts may be implied against corporations the same as against natural persons.<sup>8</sup>

<sup>1</sup> *Holland v. San Francisco*, 7 Cal. 361; *Osborne v. Tunis*, 1 Dutcher, 633; *Talmadge v. North American Coal, etc., Co.*, 3 Head, 337.

<sup>2</sup> *Southern Life Insurance, etc., Co. v. Lanier*, 5 Fla. 110.

<sup>3</sup> *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252.

<sup>4</sup> *Blunt v. Walker*, 11 Wis. 384.

<sup>5</sup> *Hatch v. Barr*, 1 Ohio, 390; *Koehler v. Black River Falls Iron Co.*, 2 Black, 715; *Osborne v. Tunis*, 1 Dutcher, 633; *Eagle Woolen Mills v. Monteith*, 2 Oregon, 277. See *Union Bank v. Call*, 5 Fla. 409; *Johnston v. Crawley*, 25 Ga. 316; *Phillips v. Coffee*, 17 Ill. 154; *Tenney v. East Warren, etc., Co.*, 43 N. H. 343; *Josey v. Wil. etc., Railroad*, 12 Rich. 184; *University of Michigan v. Detroit, etc., Soc.*, 12 Mich. 138; *Kinzie v. Chicago*, 2 Scam. 187. In *Haven v. Adams*, 4 Allen, 80, the following form was adjudged good: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed, and said parties of the second part have hereto set their hands and seals, the day and year first above written.

"SAM'L S. LEWIS, President (seal),

"ROBERT G. SHAW (seal)," etc.

<sup>6</sup> *Selma v. Mullen*, 46 Ala. 411; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Chesapeake and Ohio Canal v. Knapp*, 9 Pet. 541.

<sup>7</sup> *The Banks v. Poitiaux*, 3 Rand. 136; *Legrand v. Sidney College*, 5 Munf. 824.

<sup>8</sup> *Board of Education v. Greenebaum*, 39 Ill. 609; *Ross v. Madison* 1 Ind.

*§ 317. The Doctrine of this Chapter restated.*

A corporation, being an artificial person, can, like an individual man, enter into contracts. But, being created for specific purposes, and being endowed with only a part of what pertains to individuals, its powers of contract are limited by the objects for which it was brought into existence. Yet, while it must follow its charter, it may, if not restrained thereby, exercise its powers of contract by the same forms and methods which are permitted to individuals.

281; *Merrick v. Burlington, etc., Plank Road*, 11 Iowa, 74; *Petrie v. Wright*, 6 Sm. & M. 647; *Buckley v. Briggs*, 30 Miss. 452; *Canal Bridge v. Gordon*, 1 Pick. 297; *McMasters v. Reed*, 1 Grant, Pa. 86.

## CHAPTER XXII.

## CONTRACTS MADE THROUGH AGENTS.

- ¶ 318-326. General Views and Introduction.
- 327-343. Creation and Termination of Agency.
- 344-351. Express and Implied Powers of Agent.
- 352-367. Execution of Contract by the Agent.
- 368-374. Filling Blanks.
- 375-385. Agent departing from his Authority.
- 386-390. Frauds by and to Agents.
- 391. Doctrine of the Chapter restated.

§ 318. **Same as Personal.** — An act performed through an agent is the same in law as if done in person. *Qui facit per alium facit per se.* And this principle applies to contracts.<sup>1</sup>

§ 319. **Diverse Sorts of Agents.** — There are many kinds of agents, to some of whom specific names are attached by law or custom, while others are known simply as agents. Of the former are —

<sup>1</sup> Broom Leg. Max. 2d Eng. ed. 645 et seq.; Story Agency, § 2. To illustrate: A notice to an agent, while acting in the agency, is notice to the principal. Pringle *v.* Dunn, 37 Wis. 449; Mountford *v.* Scott, 3 Madd. 34; Vermont Mining and Quarrying Co. *v.* Windham County Bank, 44 Vt. 489. And a payment to the agent is payment to the principal. McCrary *v.* Ashbaugh, 44 Miss. 410; Ely *v.* Harvey, 6 Bush, 620; Yates *v.* Freckleton, 2 Doug. 623. Likewise the possession of a servant is the possession of his master. Goodwin *v.* Garr, 8 Cal. 615. When one has done a thing by his agent, it may be charged in pleading as done by the principal, the agent not being mentioned. 1 Bishop Crim. Proced. § 332. But if a pleader needlessly states, that, for example, an endorsement which in fact was by procuration was made by the defendant's "own proper hand writing being thereto subscribed," this will be ill for the variance. Levy *v.* Wilson, 5 Esp. 180.

§ 320. **Factors.**—A factor, or commission merchant, is one to whom goods are consigned for sale on commission,—who is authorized to buy (when his agency extends to purchasing) and sell either in his own name or in the name of his principal,—and in whom the law vests a special property in the goods.<sup>1</sup>

§ 321. **Brokers.**—A broker deals for a commission, or brokerage; but the thing dealt in is not always in his hands, and he has no special property therein. His business is that of a middle man; making bargains for others; or, at least, bringing the parties together. He acts, not in his own name, but in that of his principal.<sup>2</sup>

§ 322. **Other Kinds**—(Auctioneers—Common Carriers).—There are various other agents with distinguishing names; such as common carriers,<sup>3</sup> who are not generally authorized to contract; auctioneers,<sup>4</sup> who, more than most others, are to make contracts of sale, particularly at public auction; these two sorts differing in several other respects, but being alike in this, that they have a special property in the goods entrusted to them. Again,—

§ 323. **Attorneys-at-Law.**—Attorneys-at-law are agents

<sup>1</sup> Story Agency, § 33-34 *a*; *Fuentes v. Montis*, Law Rep. 3 C. P. 268, 4 C. P. 93; *Cole v. Northwestern Bank*, Law Rep. 9 C. P. 470, 10 C. P. 354; *Hopkirk v. Bell*, 4 Cranch, 164; *Taylor v. Wells*, 3 Watts, 65; *Rapp v. Palmer*, 3 Watts, 178; *Smart v. Sandars*, 3 C. B. 380.

<sup>2</sup> Story Agency, § 28-32; *Xenos v. Wickham*, Law Rep. 2 H. L. 296; *Fairlie v. Fenton*, Law Rep. 5 Ex. 169; *Calder v. Dobell*, Law Rep. 6 C. P. 486; *Baxter v. Duren*, 29 Maine, 434; *Touro v. Cassin*, 1 Nott & McC. 173; *McGavock v. Woodlief*, 20 How. U. S. 221; *Colvin v. Williams*, 3 Har. & J. 38; *Higgins v. Moore*, 34 N. Y. 417; *Kock v. Emmerling*, 22 How. U. S. 69; *Bailey v. Chapman*, 41 Misso. 536; *Shepherd v. Hedden*, 5 Dutcher, 334.

<sup>3</sup> Redf. Carriers, § 20-28; *Thurman v. Wells*, 18 Barb. 500; *King v. Shepherd*, 3 Story, 349; *Hooper v. Wells*, 27 Cal. 11; *Klauber v. American Express*, 21 Wis. 21; *Liver Alkali Co. v. Johnson*, Law Rep. 7 Ex. 267, 9 Ex. 388; *Scaife v. Farrant*, Law Rep. 10 Ex. 358.

<sup>4</sup> Story Agency, § 27; *Beller v. Block*, 19 Ark. 566; *Hulse v. Young*, 16 Johns. 1; *Minturn v. Main*, 3 Selden, 220; *Blood v. French*, 9 Gray, 197; *Boonest v. Leignez*, 2 Rich. 464; *McMechen v. Baltimore*, 3 Har. & J. 534.

of another kind.<sup>1</sup> Though their chief business is to conduct and avoid litigation, they have some incidental power of contracting for their clients.

§ 324. **Still other Agents.**—There are still other agents with distinguishing names and differing functions ; and there are ordinary persons, employed in the one instance, with authority specially defined.<sup>2</sup> A further particularization is not desirable here ; but —

§ 325. **Differing Powers of Contract.**—The reader should bear in mind the foregoing distinctions, while considering the authority of the agent to make a contract. Where this authority is given in terms by the principal, and these terms are full and precise, and nothing is left to implication, they will furnish the measure and limit of it, in all controversies between the two. But where it is not thus definite, or where the interests of other persons are involved, it may be important to consider what sort of agent he is who made the contract, and what is the law governing agents of his class.

§ 326. **What for this Chapter—How divided.**—The subject of agency is too large to be minutely explained in this chapter ; but we shall call to mind its leading doctrines as to, I. The Creation and Termination of the Agency ; II. The Express and Implied Powers of the Agent ; III. The Execution of the Contract by him ; IV. Filling Blanks ; V. The Agent departing from his Authority ; VI. Frauds by and to Agents.

### I. *The Creation and Termination of the Agency.*

#### § 327. *Under Seal, Written, Oral, etc. :—*

**Specialties.**—An authority to an agent to execute an

<sup>1</sup> *Spinks v. Davis*, 32 Missis. 152 ; *Ingraham v. Leland*, 19 Vt. 304 ; *Valentine v. Stewart*, 15 Cal. 387 ; *Ex parte Rogers*, Law Rep. 3 C. P. 490.

<sup>2</sup> *Towson v. Havre de Grace Bank*, 6 Har. & J. 47 ; *Emerson v. Miller*, 3 *Casey*, Pa. 278.

instrument under seal, in the absence of the principal, must, in all instances, be itself under seal. It can be conferred in no other way.<sup>1</sup> But —

§ 328. **In Presence of Principal.** — An act done by the agent, in the presence of the principal, is the act of the latter; and any person whom the principal permits to do the act is his agent, within this rule. Therefore, in such a case, a verbal authorization to execute the sealed instrument, or a tacit consent, is all that is required.<sup>2</sup> Again —

§ 329. **Corporation Deed.** — A corporation has no bodily presence, and it can act only by its officers and other agents. Consequently, when it makes its deed,<sup>3</sup> the authority to the person who affixes the common seal need not be under seal; since all the presence it is capable of is with its agent through whom it is acting. It could in no other manner put its seal to a power of attorney.<sup>4</sup>

§ 330. **Simple Contracts in Writing.** — Any written contract not under seal, whether required by statute — as, for example, the Statute of Frauds — to be in writing, or not, may be executed by an agent verbally authorized, with precisely the same effect as though the authority was in

<sup>1</sup> *Harshaw v. McKesson*, 65 N. C. 688; *Rowe v. Ware*, 30 Ga. 278; *Maus v. Worthing*, 3 Scam. 26; *Rhode v. Louthain*, 8 Blackf. 413; *McMurtry v. Frank*, 4 T. B. Monr. 39; *Mitchell v. Sproul*, 5 J. J. Mar. 264; *Wheeler v. Nevins*, 34 Maine, 54; *Baker v. Freeman*, 35 Maine, 485; *Shuetze v. Bailey*, 40 Misso. 69; *Smith v. Perry*, 5 Dutcher, 74; *Kime v. Brooks*, 9 Ire. 218; *Gage v. Gage*, 10 Fost. N. H. 420; *Butterfield v. Beall*, 3 Ind. 203; *Cain v. Heard*, 1 Coldw. 163; *Hanford v. McNair*, 9 Wend. 54; *Gordon v. Bulkeley*, 14 S. & R. 331; *Blood v. Goodrich*, 9 Wend. 68; *Cooper v. Rankin*, 5 Binn. 613; *Banorgee v. Hovey*, 5 Mass. 11; *Spurr v. Trimble*, 1 A. K. Mar. 278; *Worrall v. Munn*, 1 Selden, 229; *Tappan v. Redfield*, 1 Halst. Ch. 339; *Smith v. Dickinson*, 6 Humph. 261; *Berkeley v. Hardy*, 8 D. & R. 102, 5 B. & C. 355.

<sup>2</sup> *Ante*, § 16, 17, 168; *Harshaw v. McKesson*, 65 N. C. 688; *Ball v. Dunsterville*, 4 T. R. 313; *Mackay v. Bloodgood*, 9 Johns. 285. *Wend.* —

<sup>3</sup> *Ante*, § 315; *Stow v. Wyse*, 7 Conn. 214.

<sup>4</sup> See, for illustration, *Burrill v. Nahant Bank*, 2 Met. 163.

writing.<sup>1</sup> The authority may even be inferred from circumstances.<sup>2</sup>

§ 331. *Who may be Agent:*—

**Not Insane Person.**—An insane person cannot be an agent,<sup>3</sup> because incapable either of exercising a discretion or following instructions. But—

§ 332. **Any Capable Person — (Married Woman — Minor).**—Any capable person may be;<sup>4</sup> as, a *feme covert*<sup>5</sup> or a minor.<sup>6</sup> The civil disabilities do not disqualify.

§ 333. *Functions compatible and incompatible:*—

**Agent for Two or More.**—One may be an agent for two or more persons, when not required to do incompatible things;<sup>7</sup> as—

§ 334. **Auctioneer — Broker.**—An auctioneer, who is the agent of the seller, becomes also the agent of the buyer whose bid he accepts, to the extent that he can make for both parties the memorandum required by the Statute of Frauds.<sup>8</sup> And it is the same with a broker.<sup>9</sup> But—

§ 335. **Party, and Agent for Opposite Party.**—One cannot be both a party and agent for the opposite party;

<sup>1</sup> Heard *v.* Pilley, Law Rep. 4 Ch. Ap. 548; Long *v.* Hartwell, 5 Vroom, 116; Yerby *v.* Grigsby, 9 Leigh, 387; Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237, 240; Shaw *v.* Nudd, 8 Pick. 9; Small *v.* Owings, 1 Md. Ch. 363; Deverell *v.* Bolton, 18 Ves. 505, 509; Mortlock *v.* Buller, 10 Ves. 292, 311; Kemeys *v.* Proctor, 3 Ves. & B. 57; Emmerson *v.* Heelis, 2 Taunt. 38; Rucker *v.* Cammeyer, 1 Esp. 105; Coles *v.* Trecotthick, 7 Ves. 234, 250.

<sup>2</sup> Trundy *v.* Farrar, 32 Maine, 225.

<sup>3</sup> Story Agency, § 7.

<sup>4</sup> Lea *v.* Bringier, 19 La. An. 197.

<sup>5</sup> 1 Bishop Mar. Women, § 701; 2 Ib., § 400-414; Hopkins *v.* Mollinieux, 4 Wend. 465; Singleton *v.* Mann, 3 Misso. 464; Butler *v.* Price, 110 Mass. 97.

<sup>6</sup> Talbot *v.* Bowen, 1 A. K. Mar. 436.

<sup>7</sup> Hinckley *v.* Arey, 27 Maine, 362; Scott *v.* Mann, 36 Texas, 157; Cottom *v.* Holliday, 59 Ill. 176. See Walker *v.* American National Bank, 49 N. Y. 659.

<sup>8</sup> Simon *v.* Motivos, 3 Bur. 1921, 1 W. Bl. 599; Fairbrother *v.* Prattent, Dan. 64; Kemeys *v.* Proctor, 3 Ves. & B. 57; Emmerson *v.* Heelis, 2 Taunt. 38; Walker *v.* Herring, 21 Grat. 678; White *v.* Proctor, 4 Taunt. 209; Pike *v.* Balch, 38 Maine, 302; Horton *v.* McCarty, 53 Maine, 394.

<sup>9</sup> Rucker *v.* Cammeyer, 1 Esp. 105.

as, to sign for the latter, as well as himself, the memorandum required by the Statute of Frauds.<sup>1</sup> And, though he is an auctioneer, if he is selling goods in which he has an interest, the rule is the same.<sup>2</sup> Therefore, also,—

**§ 336. Agent dealing with Self.**—A factor or other agent to sell cannot buy of himself the goods of his principal, which he has for sale.<sup>3</sup> And,—

**§ 337. Agent for both Parties, with Discretion.**—If there is a discretion to be exercised in a dealing, the same person cannot be the agent of both parties; for it is inconsistent that a man should bargain with himself.<sup>4</sup>

**§ 338. Termination of the Agency:**—

**At Pleasure.**—An agent may generally withdraw from the service at pleasure;<sup>5</sup> though, if he thereby violates his contract, he will be liable to the principal in damages.<sup>6</sup> In like manner, as general doctrine, the principal may discharge the agent at will.<sup>7</sup> And he may even do it by parol, though the agency is conferred by an instrument under seal.<sup>8</sup> Nor is the rule different, though, on the face of the instrument, the authority to the agent is irrevocable.<sup>9</sup> But,—

**§ 339. Interest in the Agent.**—If the agent has a pecuniary interest of his own in the execution of the agency,—

<sup>1</sup> *Sharman v. Brandt*, Law Rep. 6 Q. B. 720.

<sup>2</sup> *Bent v. Cobb*, 9 Gray, 397.

<sup>3</sup> *Keighler v. Savage Manuf. Co.*, 12 Md. 383; *Martin v. Moulton*, 8 N. H. 504; *Scott v. Mann*, 36 Texas, 157; *ante*, § 250, 251.

<sup>4</sup> *Ex parte Bennett*, 10 Ves. 381; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 204; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *New York Central Ins. Co. v. National Protection Ins. Co.*, 4 Kernan, 85.

<sup>5</sup> *Coffin v. Landis*, 5 Philad. 176; *Conrey v. Brandegee*, 2 La. An. 132. See *post*, § 682.

<sup>6</sup> *Story Agency*, § 478; *United States v. Jarvis, Daveis*, 274.

<sup>7</sup> *Smart v. Sandars*, 3 C. B. 380; *Trumbull v. Nicholson*, 27 Ill. 149; *Brookshire v. Voncannon*, 6 Ire. 231.

<sup>8</sup> *Brookshire v. Brookshire*, 8 Ire. 74; *Blackstone v. Buttermore*, 3 Smith, Pa. 266.

<sup>9</sup> *MacGregor v. Gardner*, 14 Iowa, 326.

as, where by letter of attorney he is to sell property of the principal's, or where he is to collect money due the principal, and, in either case, is to reserve out of what he receives payment for a debt which the principal owes him; or, if his interest is in the thing itself to which the agency relates,—as, where he is mortgagee under a power of sale mortgage (such agency being termed, when of the latter sort, and by some also when of the former, an agency coupled with an interest),—the principal cannot revoke it to the injury of the agent, who, in spite of an attempted revocation, may, for his own protection, still perform the act.<sup>1</sup>

**§ 340. Death.**—The death of either party terminates the agency;<sup>2</sup> that of the agent, because a dead man can perform no act; that of the principal, because his earthly existence has ceased, and in the nature of things there can be no agent without a principal.<sup>3</sup> Even—

**§ 341. Unknown to Agent.**—Though the death of the principal is unknown to the agent, so that the latter executes in good faith what he believes to be a continuing agency, such execution is void.<sup>4</sup> But,—

<sup>1</sup> *Hunt v. Rousmanier*, 8 Wheat. 174; *Varnum v. Meserve*, 8 Allen, 158; *Watson v. King*, 4 Camp. 272; *Gaussin v. Morton*, 10 B. & C. 731; *Bromley v. Holland*, 7 Ves. 328; *Smart v. Sandars*, 3 C. B. 380; *Hutchins v. Hebbard*, 34 N. Y. 24; *Wheeler v. Knaggs*, 8 Ohio, 169, 172; *Marziou v. Poiche*, 8 Cal. 522; *Posten v. Rassette*, 5 Cal. 467; *Hynson v. Noland*, 14 Ark. 710; *Barr v. Schroeder*, 32 Cal. 609; *Bonney v. Smith*, 17 Ill. 531; *Hartley's Appeal*, 3 Smith, Pa. 212; *Blackstone v. Buttermore*, 3 Smith, Pa. 266.

<sup>2</sup> See ante, § 255.

<sup>3</sup> *Saltmarsh v. Smith*, 32 Ala. 404; *Boone v. Clarke*, 3 Cranch C. C. 389; *Scruggs v. Driver*, 31 Ala. 274; *McDonald v. Black*, 20 Ohio, 185; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Gale v. Tappan*, 12 N. H. 145.

<sup>4</sup> *Davis v. Windsor Savings Bank*, 46 Vt. 728; *Galt v. Galloway*, 4 Pet. 332, 344; *Bank of Washington v. Brent*, 2 Cranch C. C. 685; *Travers v. Crane*, 15 Cal. 12; *Wilson v. Edmonds*, 4 Fost. N. H. 517; *Rigs v. Cage*, 2 Humph. 350; *Peries v. Aycinena*, 3 Watts & S. 64; *Lewis v. Kerr*, 17 Iowa, 73; *Cleveland v. Williams*, 29 Texas, 204; *Blades v. Clark*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1.

**§ 342. Coupled with Interest.** — If the agency is coupled with an interest, as already explained,<sup>1</sup> the death cannot, on just principles, take from the agent, his rights. Still, in a court of law, it will necessarily be held to terminate the agency, notwithstanding the interest, in all those circumstances in which the act of agency can be performed only in the name of the principle ; for, exclaimed Lord Ellenborough, “ How can a valid act be done in the name of a dead man ? ”<sup>2</sup> But where, by the rules of law, the agency can be executed in the agent’s own name, — as, where he has a general or special ownership in the thing, — death, the agency being thus coupled with an interest, does not end the agent’s power. And in other circumstances equity ought to furnish relief, though it is difficult to say on the authorities when it will : thus, if A, who has agreed to sell land to B, dies, equity will compel B’s heirs to fulfill the agreement ;<sup>3</sup> in like manner, if, for a valuable consideration, A had given B a power of attorney to convey the land, equity should, as a question of just legal principle, compel B’s heirs to renew the power, or make the conveyance to the person designated by A.<sup>4</sup>

**§ 343. Other Methods.** — There are other methods of terminating an agency ; as, performance by the agent,<sup>5</sup> the conveying away, by the principal, of the thing to which the agency relates,<sup>6</sup> the bankruptcy of the principal,<sup>7</sup> his

<sup>1</sup> *Ante*, § 339.

<sup>2</sup> *Watson v. King*, 4 Camp. 272, 274.

<sup>3</sup> *1 Story Eq. Jur.* § 788, 789 ; *Barnard v. Macy*, 11 Ind. 536 ; *Newton v. Swazey*, 8 N. H. 9 ; *Tilton v. Tilton*, 9 N. H. 385 ; *Hill v. Ressegieu*, 17 Barb. 162.

<sup>4</sup> On the entire subject of this section, consult *Story Agency*, § 483, 488-490 ; *Hunt v. Rousmanier*, 8 Wheat. 174 ; *Lepard v. Vernon*, 2 Ves. & B. 51 ; *Varnum v. Meserve*, 8 Allen, 158 ; *McGriff v. Porter*, 5 Fla. 373 ; *Houghtaling v. Marvin*, 7 Barb. 412 ; *Bergen v. Bennett*, 1 Caines Cas. 1 ; *Robertson v. Paul*, 16 Texas, 472 ; *Buchanan v. Monroe*, 22 Texas, 537 ; *Van Bergen v. Demarest*, 4 Johns. Ch. 37 ; *Speer v. Hadduck*, 31 Ill. 439.

<sup>5</sup> *Antoni v. Belknap*, 102 Mass. 193.

<sup>6</sup> *Trumbull v. Nicholson*, 27 Ill. 149.

<sup>7</sup> *Story Agency*, § 482.

insanity or the agent's,<sup>1</sup> where the agency is not coupled with an interest; but these and yet other obvious methods need not be dwelt upon further.

## II. *The Express and Implied Powers of the Agent.*

§ 344. **Express.**—When an agent is instructed in express words, requiring no interpretation, no question can arise as to his powers. But not often, in the transactions of life, is he thus instructed; even where his authority is in writing, more or less is generally left to implication. Therefore this sub-title chiefly concerns powers which are—

§ 345. **Implied.**—The implications are derived either from the words employed, or from the nature of the agency.

§ 346. *Implications from the Words conferring the Authority:*—

**Carry out what is Expressed.**—The law implies whatever is necessary to the power expressed. For example,—

§ 347. **From Authority to Sell.**—If a letter of attorney authorizes one to sell real estate and receive the purchase money, he can, therefore, execute the proper instruments of conveyance; for, without them, a sale cannot be made complete, and the money received.<sup>2</sup> And the power to sell a manufactured article carries with it the power to warrant the quality.<sup>3</sup> So—

§ 348. **From Authority to Purchase.**—A power to purchase goods necessarily implies an authority to direct as to their delivery.<sup>4</sup> Yet—

§ 349. **Submit to Arbitration.**—An agent to settle

<sup>1</sup> *Davis v. Lane*, 10 N. H. 156; *Story Agency*, § 481, 487.

<sup>2</sup> *Valentine v. Piper*, 22 Pick. 85. And see *Holladay v. Daily*, 19 Wal. 606; *Lumpkin v. Wilson*, 5 Heisk. 555; *Dupont v. Werthemann*, 10 Cal. 354; *Borel v. Rollins*, 80 Cal. 408; *Heath v. Nutter*, 50 Maine, 378; *Watts's Appeal*, 28 Smith, Pa. 370.

<sup>3</sup> *Boothby v. Scales*, 27 Wis. 626.

<sup>4</sup> *Owen v. Brockschmidt*, 54 Misso. 285.

claims against his principal cannot, therefore, submit them to arbitration.<sup>1</sup>

**§ 350. Implications from the Nature of the Agency:—**

**Delegate to Sub-agent, or not.**— Whenever there is a discretion in the agent, the agency is a personal trust, and he cannot delegate it to another.<sup>2</sup> But a merely ministerial power may be delegated.<sup>3</sup>

**§ 351. Kind of Agency—(Broker—Factor—Auctioneer.)**— The powers of the agent often depend on the sort of agency in which he is engaged. Thus, if a broker is employed to sell goods, he must sell them as the principal's, and at private sale, not at auction; nor has he any implied authority even to receive payment for what he sells.<sup>4</sup> But a factor, thus employed, usually takes the goods into his own possession; he has then a special property in them, he may sell them if he chooses in his own name, at private sale, not at auction; and, if he pleases, on credit.<sup>5</sup> An auctioneer sells at auction.<sup>6</sup>

### III. *The Execution of the Contract by the Agent.*

**§ 352. Distinctions.**— The manner of executing contracts by agents differs in some degree with the sort of contract and the subject to which it relates.

<sup>1</sup> Michigan Central Railroad *v.* Gougar, 55 Ill. 503.

<sup>2</sup> Grady *v.* American Cent. Ins. Co., 60 Misso. 116; Brewster *v.* Hobart, 15 Pick. 302; Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 287; Paul *v.* Edwards, 1 Misso. 30; Hunt *v.* Douglass, 22 Vt. 128; Warner *v.* Martin, 11 How. U. S. 209, 224; Loomis *v.* Simpson, 13 Iowa, 532.

<sup>3</sup> Grady *v.* American Cent. Ins. Co., *supra*; Ex parte Sutton, 2 Cox, 84; Commercial Bank *v.* Norton, 1 Hill, N. Y. 501; Grinnell *v.* Buchanan, 1 Daly, 588; Eldridge *v.* Holway, 18 Ill. 445.

<sup>4</sup> *Ante*, § 321; Higgins *v.* Moore, 34 N. Y. 417.

<sup>5</sup> *Ante*, § 320; West Boylston Manuf. Co. *v.* Searle, 15 Pick. 225; Goodenow *v.* Tyler, 7 Mass. 36; Goldthwaite *v.* McWhorter, 5 Stew. & P. 284; Byrne *v.* Schwing, 6 B. Monr. 199.

<sup>6</sup> *Ante*, § 322.

**§ 353. Specialties.** — If the contract is under seal, and the words of covenant, grant, or the like are on the face of it the agent's, and the seal purports to be his, the instrument will bind him personally, though he describes himself therein as agent, and adds the word "agent" to his signature; and it will not bind the principal. To have the latter effect, it must appear strictly on its face to be the principal's, and the seal must purport to be his; and then the agent will not be personally bound.<sup>1</sup> "If," says Metcalf, "it be executed in the principal's name, it is not material by what form of words such execution is denoted; whether it be 'for A B, C D,' or 'A B by C D his attorney,' or 'C D attorney for A B.'" <sup>2</sup> And, in strict law, it is probably sufficient for the agent to affix the principal's name and seal, or even the seal alone,<sup>3</sup> without writing his own name.<sup>4</sup>

**§ 354. Simple Contracts: —**

**Commercial Usage.** — "The law of merchants is part of the law of the land."<sup>5</sup> And this law, much of which is of modern growth, regards, in general, the substance of a transaction rather than its formalities. Combining with certain principles, not all of which are recognized as appli-

<sup>1</sup> *Berkeley v. Hardy*, 8 D. & R. 102, 5 B. & C. 355; *Appleton v. Binks*, 5 East, 148; *Carter v. Chaudron*, 21 Ala. 72; *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Bogart v. De Bussy*, 6 Johns. 94; *Locke v. Alexander*, 1 Hawks, 412; *The State v. Jennings*, 5 Eng. 428; *Palmer v. Res-pass*, 5 T. B. Monr. 562; *Pryor v. Coulter*, 1 Bailey, 517; *Barger v. Miller*, 4 Wash. C. C. 280; *Redmond v. Coffin*, 2 Dev. Eq. 437; *Grubbs v. Wiley*, 9 Sm. & M. 29; *Martin v. Flowers*, 8 Leigh, 158; *Love v. Sierra Nevada Lake Water, etc., Co.*, 32 Cal. 639. But see *Rogers v. Bracken*, 15 Texas, 564; *Rogers v. Frost*, 14 Texas, 267.

<sup>2</sup> *Met. Con.* 105, referring to *Combes's Case*, 9 Co. 75 *a*, 76; *Wilks v. Back*, 2 East, 142; *Elwell v. Shaw*, 16 Mass. 42, 1 Greenl. 339; *Fowler v. Shearer*, 7 Mass. 14; *Brinley v. Mann*, 2 *Cush.* 337; *Mussey v. Scott*, 7 *Cush.* 215; *Jones v. Carter*, 4 *Hen. & Mufn.* 184; *Wilburn v. Larkin*, 3 *Blackf.* 55; *Hunter v. Miller*, 6 B. Monr. 612; *Eckhart v. Reidel*, 16 Texas, 62.

<sup>3</sup> *Ante*, § 17.

<sup>4</sup> *Devinney v. Reynolds*, 1 *Watts & S.* 328.

<sup>5</sup> Lord Kenyon in *Harrison v. Jackson*, 7 T. R. 207, 210.

eable to sealed instruments, it has, step by step, proceeded to the establishment of rules quite unlike the foregoing, for all contracts, whether oral or written, not under seal. Thus,—

§ 355. **The Principles.**—1. All acquisitions which an agent makes in his agency, beyond his compensation, belong to the principal.<sup>1</sup> Hence,—

2. If an agent, acting in his agency, obtains a contract, though in his own name, the contract interest is the principal's.<sup>2</sup>

3. While, on the one hand, a principal may thus take the avails of a contract made by his agent, though in the agent's name; he must also, on the other hand, bear its burdens, being responsible for the agent's acts.<sup>3</sup>

4. The right to maintain a suit at law follows a legal interest.<sup>4</sup>

5. A written contract cannot be contradicted by oral evidence.<sup>5</sup>

From these propositions we derive the following results:—

§ 356. **Who sue and be sued.**—If A and B are principals, and X is the agent of A, and Y the agent of B,—then, if X and Y, each acting in his agency, but not disclosing it to the other, make a contract, whether oral or written, each is holden to the other; for so each understood it, and such are its terms. But the law has vested in A the apparent interest of X, and in B the apparent interest of Y; therefore, also, A is holden to B, and B is holden to A; for such is the legal effect of the transaction. Still further, each principal may stand, if he chooses, or be placed, if the

<sup>1</sup> *Lafferty v. Jelley*, 22 Ind. 471; *Denson v. Stewart*, 15 La. An. 456.

<sup>2</sup> *Messier v. Amery*, 1 Yeates, 533; *Von Hurter v. Spengeman*, 2 C. E. Green, 185; *Audenried v. Betteley*, 8 Allen, 302; *Damon v. Osborn*, 1 Pick. 476, 481.

<sup>3</sup> *East India Co. v. Hensley*, 1 Esp. 112; *Elwell v. Chamberlin*, 31 N. Y. 611.

<sup>4</sup> *Heald v. Warren*, 22 Vt. 409; *Townsend v. Townsend*, 5 Harring. Del. 127. And see *Stoddard v. Mix*, 14 Conn. 12.

<sup>5</sup> *Ante*, § 58.

other chooses, in the shoes of his agent; so that A may sue either B or Y, and B may sue either A or X. Again, X, if his principal does not interfere, may sue either B or Y; and Y, if his principal does not object, may sue either A or X. Other deductions will appear further on; but we shall first proceed to some propositions established by the courts, within these deductions.

**§ 357. Agent holden.**—If the agent does not disclose his agency, or if he mentions it in mere general terms but does not name his principal,<sup>1</sup> or if his principal resides abroad,<sup>2</sup> the agent will, in the absence of any contrary showing, be bound as on his own personal contract. Or, if an agent executes a written contract in his own name, he will be bound by its terms, if adequate, though he is known to be acting as agent; and the mere appending of the word “agent” to his signature will not save him.<sup>3</sup> But,—

<sup>1</sup> *Merrill v. Wilson*, 6 Ind. 426; *Wheeler v. Reed*, 36 Ill. 81; *Pierce v. Johnson*, 34 Conn. 274; *Mithoff v. Byrne*, 20 La. An. 363; *McClellan v. Parker*, 27 Misso. 162; *McComb v. Wright*, 4 Johns. Ch. 659; *Forney v. Shipp*, 4 Jones, N. C. 527; *Meyer v. Barker*, 6 Binn. 228; *Davenport v. Riley*, 2 McCord, 198; *Conyers v. McGrath*, 4 McCord, 292; *Bacon v. Sondley*, 3 Strob. 542; *Royce v. Allen*, 28 Vt. 234; *Baldwin v. Leonard*, 39 Vt. 260.

<sup>2</sup> *Elbinger Actien-Gesellschaft v. Claye*, Law Rep. 8 Q. B. 313; *Armstrong v. Stokes*, Law Rep. 7 Q. B. 598, 605. It will bind the foreign principal, and not the domestic agent, where such appears to have been the intention. *Rogers v. March*, 33 Maine, 106; *Bray v. Kettell*, 1 Allen, 80. See, also, *Hutton v. Bulloch*, Law Rep. 8 Q. B. 831, 9 Q. B. 572.

<sup>3</sup> *Higgins v. Senior*, 8 M. & W. 834; *Sayre v. Nichols*, 5 Cal. 487; *Hall v. Cockrell*, 28 Ala. 507; *Andrews v. Allen*, 4 Harring. Del. 452; *Bickford v. First National Bank*, 42 Ill. 238; *Deming v. Bullitt*, 1 Blackf. 241; *Wiley v. Shank*, 4 Blackf. 420; *Crum v. Boyd*, 9 Ind. 289; *Scott v. Messick*, 4 T. B. Monr. 535; *McBean v. Morrison*, 1 A. K. Mar. 545; *Nugent v. Hickey*, 2 La. An. 358; *Forster v. Fuller*, 6 Mass. 58; *Thacher v. Dinsmore*, 5 Mass. 299; *Sumner v. Williams*, 8 Mass. 162; *Whiting v. Dewey*, 15 Pick. 428; *Hastings v. Lovering*, 2 Pick. 214; *Stackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, 11 Mass. 54; *Arfridson v. Ladd*, 12 Mass. 173; *Seaver v. Coburn*, 10 Cush. 324; *Bass v. Randall*, 1 Minn. 404; *Rollins v. Phelps*, 5 Minn. 463; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Minn. 187; *Chouteau v. Paul*, 3 Misso. 260; *Sheldon v. Dunlap*, 1 Harrison, 245; *Stone v. Wood*, 7 Cow. 453; *Bank of Rochester v. Monteath*, 1 Denio, 402; *Cabre v. Sturges*, 1 Hilton, 160;

§ 358. **Not holden.** — Where the execution of the instrument is in such form that the agent would not be holden were it under seal,<sup>1</sup> and in various cases where he would, but evidently on the face of it he was understood as acting merely for his principal,<sup>2</sup> he incurs no personal responsibility, yet the principal will be bound as party.<sup>3</sup>

§ 359. **Principal holden — (Agent also).** — Although, where the principal and the agency are known when the contract is made, both principal and agent will not be bound, because then is the time for the other contracting party to elect between them;<sup>4</sup> yet, if such party does not then know that he is dealing with an agent, or if the agent declines to name the principal, he may, on learning the facts, hold the latter as the party, if he chooses.<sup>5</sup> “For it is a general rule, that, whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person.

*Blakeman v. Mackay*, 1 Hilton, 266; *Collins v. Buckeye Ins. Co.*, 17 Ohio State 215; *Fash v. Ross*, 2 Hill, S. C. 294; *Hodges v. Green*, 28 Vt. 358; *Allen v. Pegram*, 16 Iowa, 163; *Steele v. McElroy*, 1 Sneed, Tenn. 341; *McWilliams v. Willis*, 1 Wash. Va. 199.

<sup>1</sup> *Ante*, § 358.

<sup>2</sup> *McCall v. Clayton*, Busbee, 422; *Smith v. Alexander*, 31 Misso. 193; *Detroit v. Jackson*, 1 Doug. Mich. 106; *Many v. Beekman Iron Co.*, 9 Paige, 188; *Traynham v. Jackson*, 15 Texas, 170; *Eastern Railroad v. Benedict*, 5 Gray, 561; *Sayre v. Nichols*, 7 Cal. 535; *Seery v. Socks*, 29 Ill. 313; *Ogden v. Raymond*, 22 Conn. 379; *Baker v. Chambles*, 4 Greene, Iowa, 428; *Tuttle v. Ayres*, 2 Penning, 682; *Shotwell v. McKown*, 2 Southard, 828; *Rathbon v. Budlong*, 15 Johns. 1; *Meadows v. Smith*, 12 Ire. 18; *Powell v. Finch*, 5 Yerg. 446; *Hall v. Huntoon*, 17 Vt. 244; *Harkins v. Edwards*, 1 Iowa, 426; *Rogers v. March*, 33 Maine, 106; *Bank of Cape Fear v. Wright*, 8 Jones, N. C. 376; *Abbott v. Cobb*, 17 Vt. 593.

<sup>3</sup> *Lyon v. Williams*, 5 Gray, 557.

<sup>4</sup> *Post*, § 364; *Coxe v. Devine*, 5 Harring. Del. 375; *Paterson v. Gandasequi*, 15 East, 62.

<sup>5</sup> *Thomson v. Davenport*, 9 B. & C. 78, 2 Smith Lead. Cas. 212, and see Mr. Smith's note; *Raymond v. Crown and Eagle Mills*, 2 Met. 319; *French v. Price*, 24 Pick. 13; *Violett v. Powell*, 10 B. Monr. 347; *Hubbert v. Borden*, 6 Whart. 79; *Higgins v. Senior*, 8 M. & W. 884; *Beckham v. Drake*, 9 M. & W. 79; *Briggs v. Partridge*, 64 N. Y. 357; *post*, § 394.

with whom, in point of law, it was made.”<sup>1</sup> On the other hand,—

§ 360. **Principal sue on Agent's Contract.**—The principal can, if he chooses, maintain an action in his own name on a contract which thus, he being unknown, his agent has made for him in the agent's name, whether oral or in writing; and there is some reason, while also there is some authority, for saying that this is so even though he was known to the other contracting party at the making of the contract.<sup>2</sup> But—

§ 361. **Agent sue.**—The agent, also, if the principal does not interfere, may sue, in his own name, on a contract which he has thus made in his own name; yet not on one in the name of his principal.<sup>3</sup>

§ 362. **Rights of Third Persons, etc.**—These doctrines are not carried to the extent of interfering with the legal and equitable rights of any persons. Though the principal sues or is sued in his own name, third persons, the agents, and the parties will have all their just claims, whether legal or equitable, respected,—too numerous to be here particularized.<sup>4</sup>

<sup>1</sup> *Cothay v. Fennell*, 10 B. & C. 671, 672.

<sup>2</sup> *Brooks v. Minturn*, 1 Cal. 481; *Eastern Railroad v. Benedict*, 5 Gray, 561; *Machias Hotel v. Coyle*, 35 Maine, 405; *Barry v. Page*, 10 Gray, 398; *Ford v. Williams*, 21 How. U. S. 287; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. 344, 381; *Ruiz v. Norton*, 4 Cal. 355; *Woodruff v. McGehee*, 30 Ga. 158; *Oelrichs v. Ford*, 21 Md. 489; *Ames v. St. Paul*, etc., *Railroad*, 12 Minn. 412; *Elkins v. Boston*, etc., *Railroad*, 19 N. H. 337; *Taintor v. Prendergast*, 3 Hill, N. Y. 72; *Van Lien v. Byrnes*, 1 Hilton, 133; *Erickson v. Compton*, 6 How. Pr. 471; *Merrick's Estate*, 2 Ashm. 485; *Huntington v. Knox*, 7 Cush. 371; *Gilpin v. Howell*, 5 Barr, 41.

<sup>3</sup> *Colburn v. Phillips*, 13 Gray, 64; *Sharp v. Jones*, 18 Ind. 314; *Ackerman v. Cook*, 34 Missis. 262; *Crosby v. Watkins*, 12 Cal. 85; *Devers v. Becknell*, 1 Misso. 333; *Gunn v. Cantine*, 10 Johns. 387; *Brackney v. Shreve, Coxe*, 33; *Coggburn v. Simpson*, 22 Misso. 351; *Doe v. Thompson*, 2 Fost. N. H. 217.

<sup>4</sup> *Merrick's Estate*, 2 Ashm. 485; *Foster v. Smith*, 2 Coldw. 474; *Waring v. Favenck*, 1 Camp. 85; *Kymar v. Suwercropp*, 1 Camp. 109; *Thomson v. Davenport*, 9 B. & C. 78; *Smyth v. Anderson*, 7 C. B. 21, 39; *Violett v. Powell*,

**§ 363. Express Words of Contract—(Parol Evidence).—**

It is competent for the parties to vary the foregoing results by express words in their written contract, and the words cannot be contradicted by oral evidence.<sup>1</sup> Where it is in the ordinary terms of such an instrument between principals, no contradiction of its words is involved in receiving oral proof of the agency, and thus permitting the real principals to sue and be sued upon it. This “does not,” said Parke, B., “deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.”<sup>2</sup> But where, in a charter-party, the agent declared himself to be the “owner” of the vessel, the court held that parol evidence was not admissible to prove this declaration false, and so let in the true owner, being the real principal, to be the party to a suit.<sup>3</sup>

**§ 364. Not both Agent and Principal.**—As already intimated,<sup>4</sup> the principal and agent are neither joint nor several contractors, nor is the one a surety for the other; but, where the election to make either the principal or the agent a party in the suit is permitted, it is because the agent is the party in fact, and the principal is the party in law.) Therefore, when, with knowledge of the facts, the opposite party has made his choice, he is bound by it; and he cannot proceed either jointly or severally against both, or, discontinuing proceedings against one, hold the other.<sup>5</sup> Still,—

10 B. Monr. 347; *Burnham v. Holt*, 14 N. H. 367; *Kelley v. Munson*, 7 Mass. 319; *Kingman v. Pierce*, 17 Mass. 247; *Merrill v. Bank of Norfolk*, 19 Pick. 32; *Selkirk v. Cobb*, 18 Gray, 313; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Hall v. Williams*, 27 Vt. 405.

<sup>1</sup> *Ante*, § 355.

<sup>2</sup> *Higgins v. Senior*, 8 M. & W. 834, 844.

<sup>3</sup> *Humble v. Hunter*, 12 Q. B. 310, 316.

<sup>4</sup> *Ante*, § 359.

<sup>5</sup> *Smith Con. 2d Eng. ed.* 320 *et seq.*, and cases there cited; namely, *Pater-*  
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§ 365. **Custom of a Trade.**—“By the custom of the particular trade,” observes Pollock, “the agent may be treated as a contracting party, and personally bound, as well as his principal.”<sup>1</sup> Finally,—

§ 366. **Government Agent.**—An agent for the government, though he contracts in his own name, is not personally holden, but the principal is bound.<sup>2</sup>

§ 367. **Concerning the Authorities.**—On the subject of this sub-title, there is some difference between the earlier and later decisions; and, even among the later, some real or apparent conflict. While, therefore, the foregoing doctrines are all well established, at least in the modern law, there may be *dicta*, and perhaps adjudications, to be found in the books contrary to some of them, or qualifying them. Possibly slight qualifications, at one or two points, may properly be admissible; yet none of much importance. A minuter delineation would not accord with the plan of this work.

#### IV. *Filling Blanks.*

§ 368. **Distinctions.**—The doctrine of the execution of instruments in blank, and the filling of the blanks by agents, is not alike in simple contracts and specialties.<sup>3</sup> And the rules as to both derive some apparent modifications from the doctrine of estoppel. The cases are in some conflict, particularly as to the filling of blanks in deeds; but the principles on which they ought to proceed are plain.

son *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 573; Thomson *v.* Davenport, 9 B. & C. 78. The facts of these cases do not cover all the ground of the propositions in the text, which I have purposely made as broad as the principle on which they rest.

<sup>1</sup> Pollock Con. 431, referring to Humfrey *v.* Dale, 7 Ellis & B. 266; Dale *v.* Humfrey, Ellis, B. & E. 1004; Fleet *v.* Murton, Law Rep. 7 Q. B. 126, 129; and Hutchinson *v.* Tatham, Law Rep. 8 C. P. 482.

<sup>2</sup> Macbeath *v.* Haldimand, 1 T. R. 172; Hodgson *v.* Dexter, 1 Cranch, 345.

<sup>3</sup> In re Tahiti Cotton Co., Law Rep. 17 Eq. 273.

§ 369. *In Specialties:* —

**When certainly good.** — If an instrument under seal is signed and sealed, but not delivered, with blanks for the names of parties, sums, description of the premises, or the like, the blanks may be filled by any person in the presence of the maker, with his authority, though only verbal,<sup>1</sup> — or, in his absence, with his authority under seal,<sup>2</sup> — and, on its delivery, it will be equally good as if they had been filled before sealing.<sup>3</sup> And, within this doctrine, an agent authorized under seal, or the party himself, may fill the blank and redeliver the instrument, after it has been delivered.<sup>4</sup> But a redelivery is necessary.<sup>5</sup> Again, as the mere date is not an essential part,<sup>6</sup> plainly a blank for it may at any time be filled, in the absence of the maker, by parol authority.<sup>7</sup> But, beyond this, the right to fill blanks in specialties does not, in principle, extend; and such also are the prevailing adjudications. Thus, —

**§ 370. Limit of the Doctrine.** — As the authority of an agent to execute a sealed instrument in the absence of the principal must be under seal,<sup>8</sup> and as the blanks — for example, where the name of the grantee is in blank<sup>9</sup> — leave the writing a nullity though formally sealed and delivered, the English<sup>10</sup> and better American<sup>11</sup> doctrine holds,

<sup>1</sup> *Ante*, § 168, 328.

<sup>2</sup> *Ante*, § 327.

<sup>3</sup> *Parry v. Dale*, *Yelv.* 95, 96, and *Metcalf's note*.

<sup>4</sup> *See Gibbs v. Frost*, 4 *Ala.* 720.

<sup>5</sup> *McNutt v. McMahan*, 1 *Head*, 98.

<sup>6</sup> *Ante*, § 19.

<sup>7</sup> *See Whiting v. Daniel*, 1 *Hen. & Munf.* 391; *Bell v. Quick*, 1 *Green Ch.* 312; *Fournier v. Cyr*, 64 *Maine*, 32; *Commonwealth Bank v. McChord*, 4 *Dana*, 191.

<sup>8</sup> *Ante*, § 327.

<sup>9</sup> *Wunderlin v. Cadogan*, 50 *Cal.* 613; *Preston v. Hull*, 23 *Grat.* 600; *ante*, § 22.

<sup>10</sup> In *Burns v. Lynde*, 6 *Allen*, 305, 307, et seq., the principal English authorities are collected and considered; as, *Hibblewhite v. McMorine*, 6 *M. & W.* 200; *Davidson v. Cooper*, 11 *M. & W.* 778, 793.

<sup>11</sup> *Burns v. Lynde*, *supra*; *Wunderlin v. Cadogan*, *supra*; *Preston v. Hull*,

that, therefore, what could not be originally made in whole by an agent not authorized by seal cannot be made as to its essential part. Still,—

**§ 371. Some Effect.**—Though a sealed instrument, the blanks of which have thus been filled by parol authority, is not a specialty, it may have the effect of a simple contract in writing; the seal being deemed a mere excess of the agent's power, and, as a seal, but no more, void.<sup>1</sup>

**§ 372. In Simple Contracts:—**

**Always valid.**—As any form of authority, oral or in writing, express or implied,<sup>2</sup> will sustain a simple contract executed by the agent; so any person thus authorized may fill a blank in such contract. And where one, to charge himself, signs a paper writing, with a blank in it evidently meant to be filled, and delivers it to a third person, or in general even to the party, an authority is implied in the person to whom it is delivered to fill the blank.<sup>3</sup> But—

**§ 373. Alteration.**—The act of filling the blank must not extend to unauthorized alterations of other parts of the instrument, so as to change its legal effect. And, if the holder of a blank bill of exchange thus converts it into a promissory note, he thereby makes it void.<sup>4</sup>

supra; *Viser v. Rice*, 33 Texas, 189; *Cross v. State Bank*, 5 Pike, 525; *Pennsylvania Ins. Co. v. Dovey*, 14 Smith, Pa. 260; *Davenport v. Sleight*, 2 Dev. & Bat. 381; *Byers v. McClanahan*, 6 Gill & J. 250. The reader will find various other cases, on both sides of this question, in the digests. Those which have affirmed the power which the text denies, proceed on an ignoring of the principle involved.

<sup>1</sup> *McCown v. Wheeler*, 20 Texas, 372; *Viser v. Rice*, 33 Texas, 189; *Crozier v. Carr*, 11 Texas, 376; post, § 377.

<sup>2</sup> *Ante*, § 330.

<sup>3</sup> *In re Tahiti Cotton Co.*, Law Rep. 17 Eq. 273; *Spitler v. James*, 32 Ind. 202; *Commonwealth Bank v. McChord*, 4 Dana, 191; *Wiley v. Moor*, 17 S. & R. 438; *Smith v. Crooker*, 5 Mass. 538; *Duncan v. Hodges*, 4 McCord, 239; *Jordan v. Neilson*, 2 Wash. Va. 164; *Boardman v. Gore*, 1 Stew. 517; *South Berwick v. Huntress*, 58 Maine, 89.

<sup>4</sup> *Luellen v. Hare*, 32 Ind. 211. And see *Rainbolt v. Eddy*, 34 Iowa, 440; *Arrington v. Burton*, 19 Ala. 114.

§ 374. *Estoppel* :—

**In General.**—There may be circumstances in which, though the blanks have been unlawfully filled, the party will by his conduct make the instrument binding upon him under the doctrine of estoppel already considered.<sup>1</sup> A mere naked declaration of the principal, approving of what has been done in filling the blanks in a specialty without sealed authority, will not have this effect ;<sup>2</sup> but, it would seem in principle, and probably it is the doctrine in authority, that, if one has led another to suppose that the blanks in his deed have been duly filled, and to act in a way to be defrauded were this not so, he will be estopped to deny the validity of the deed.<sup>3</sup>

V. *The Agent departing from his Authority.*

§ 375. **Must exactly pursue Authority.**—Subject to the rights of third persons, acquired by a sort of estoppel, an agent binds his principal only when he pursues exactly the authority conferred ;<sup>4</sup> “although,” adds Story, “a circumstantial variance in its execution will not defeat it.”<sup>5</sup> And,—

§ 376. **Exceeding Authority.**—Should he do more than he is authorized, this will not vitiate what is properly done, if the two are separable ; otherwise, it will.<sup>6</sup> Thus,—

<sup>1</sup> *Ante*, § 126 et seq.

<sup>2</sup> *Davenport v. Sleight*, 2 Dev. & Bat. 381.

<sup>3</sup> See, and compare, *Rhode v. Louthain*, 8 Blackf. 413; *Hill v. Scales*, 7 Yerg. 410; *Byers v. McClanahan*, 6 Gill & J. 250; *Owen v. Perry*, 25 Iowa, 412.

<sup>4</sup> *Baxter v. Lamont*, 60 Ill. 237; *Towle v. Leavitt*, 3 Fost. N. H. 360; *Batty v. Carswell*, 2 Johns. 48; *Allen v. Ogden*, 1 Wash. C. C. 174; *Nixon v. Hyserott*, 5 Johns. 58; *Angel v. Pownal*, 3 Vt. 461, 463; *McConnell v. Bowdry*, 4 T. B. Monr. 392; *Rawson v. Curtiss*, 19 Ill. 456; *Hayden v. Middlesex Turnpike*, 10 Mass. 397, 403; *Adams v. Bourne*, 9 Gray, 100; *Howard v. Braithwaite*, 1 Ves. & B. 202.

<sup>5</sup> *Story Agency*, § 165; *Boykin v. McLauchlin*, 35 Ala. 286.

<sup>6</sup> *Story Agency*, § 166; *Drumwright v. Philpot*, 16 Ga. 424; *Crozier v. Carr*, 132

§ 377. **Seal or not.**—A written authority, not under seal, will not qualify the agent to execute a sealed instrument for his principal;<sup>1</sup> but, should he do this, the seal only, which is separable from the rest, is void, and the instrument will take effect as a simple contract.<sup>2</sup> Again,—

§ 378. **Authorized Sale and Unauthorized Covenants.**—If an agent makes an authorized sale, but adds unauthorized covenants, the former will bind the principal, but the latter will not. As, however, the purchaser can be compelled only to what he agreed, he has his election, if the principal will not ratify the covenants, either to affirm the sale without them, or to reject the whole.<sup>3</sup> On the other hand,—

§ 379. **Unauthorized Credit.**—A purchase of goods and an actual or agreed payment for them are inseparable; so that, if a special agent to buy them is provided with the money, but, contrary to instructions, he pledges his principal's credit for them, the latter is to no extent whatever bound.<sup>4</sup> Likewise,—

§ 380. **Price limited.**—If a special agent is authorized to sell land or goods at a fixed price, yet, in violation of instructions, sells at a different price, he does not bind the principal.<sup>5</sup>

§ 381. **Agency general or special.**—The distinction

11 Texas, 376; *Moore v. Thompson*, 32 Maine, 497; *Jesup v. City Bank*, 14 Wis. 381.

<sup>1</sup> *Ante*, § 327.

<sup>2</sup> *Ante*, § 371; *Morrow v. Higgins*, 29 Ala. 448; *Baum v. Dubois*, 7 *Wright, Pa.* 260, 265; *Long v. Hartwell*, 5 *Vroom*, 116; *Dutton v. Warschauer*, 21 *Cal.* 609; *Worrall v. Munn*, 1 *Selden*, 229; *Wood v. Auburn*, etc., *Railroad*, 4 *Selden*, 160.

<sup>3</sup> *Vanada v. Hopkins*, 1 *J. J. Mar.* 285; *Smith v. Tracy*, 36 *N. Y.* 79. And see *Brady v. Todd*, 9 *C. B. n. s.* 592.

<sup>4</sup> *Boston Iron Co. v. Hale*, 8 *N. H.* 368; *Jaques v. Todd*, 3 *Wend.* 88; *Patton v. Brittain*, 10 *Ire.* 8. And see *Lansdale v. Shackelford*, *Walk. Missis.* 149; *Tate v. Evans*, 7 *Miss.* 419; *White v. Cooper*, 3 *Barr.*, 130.

<sup>5</sup> *National Iron Armor Co. v. Bruner*, 4 *C. E. Green*, 381; *Anonymous*, cited 15 *East*, 407. And see *Adams v. Flanagan*, 36 *Vt.* 400; *Hopkins v. Blane*, 1 *Call*, 361; *Blane v. Proudfit*, 3 *Call*, 207; *Whitehead v. Tuckett*, 15 *East*, 400.

should be borne in mind, that these are cases of special agents, whose transactions are confined to the particular instances; not of general agents, acting within an accustomed sphere, concerning whose authority third persons are justified in drawing inferences. For,—

**§ 382. Principal's Representations to Public.**—Within a doctrine considered under “*Estoppel*,”<sup>1</sup> if one represents to another, or to the public, directly or by conduct, that a particular person is authorized to act as his agent in a transaction, and this person so acts, he is bound; though, in fact, there was no authority, or the authority did not extend to the doing of what was done.<sup>2</sup> And most of the actual transactions under real or assumed agencies come within this proposition. Thus,—

**§ 383. Usage of Particular Business.**—Agents employed in a particular business, of a known and established kind, are presumed to have the authority generally entrusted to such agents; and, though in fact they have not, third persons, without notice, are protected in dealing with them as though they had.<sup>3</sup> But what is done beyond the usage, and not within the authority in fact, does not bind the principal.<sup>4</sup> And—

**§ 384. Former Dealings through the Agent.**—A course

<sup>1</sup> *Ante*, § 126 et seq.

<sup>2</sup> *Lewis v. Bourbon*, 12 Kan. 186; *Dodge v. McDonnell*, 14 Wis. 553. See *Ish v. Crane*, 8 Ohio State, 520. On this principle, payment to a person found in a merchant's counting-room, ostensibly entrusted with the conduct of business therein, operates as payment to the merchant, though in fact the person was not employed. *Barrett v. Deere, Moody & M.* 200. For one who places another in a position to mislead a third person to believe there is an agency is bound by the other's act therein. *De Baun v. Atchison*, 14 Miss. 543; *Dunham v. Jackson*, 6 Wend. 22; *Linsley v. Lovely*, 26 Vt. 123.

<sup>3</sup> *Minor v. Mechanics' Bank*, 1 Pet. 46, 70; *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400; *Wright v. Solomon*, 19 Cal. 64; *Chouteaux v. Leech*, 6 Harris, Pa. 224; *York County Bank v. Stein*, 24 Md. 447; *Williams v. Getty*, 7 Casey, 461; *Mount Olivet Cemetery v. Shubert*, 2 Head, 116.

<sup>4</sup> *Pope v. Albion Bank*, 57 N. Y. 126. And see *Browning v. Owen*, 44 Ind. 11.

of dealing by the particular agent, sanctioned by the principal,—as, for example, in paying bills without denying the authority,—will enable the same agent to charge his principal in other similar cases, even though, in fact, the authority never existed, or has been withdrawn.<sup>1</sup> And,—

**§ 385. Notice of Withdrawal.**—If the authority has once existed, in fact or by implication, the principal on withdrawing it must give notice that it has ceased; or he will be holden to any innocent third person who may deal with the former agent, believing the agency to continue.<sup>2</sup> Anything adequate to put one on enquiry will be deemed notice;<sup>3</sup> for, where the agent is not authorized in fact, a third person, to maintain a claim against the supposed principal, must himself have conducted in good faith.<sup>4</sup>

## VI. *Fraud by and to Agents.*

**§ 386. Agent Authorized.**—It is a universal principle that one who commits a wrong, whether civil or criminal, through the agency of another, bears the same responsibility as if he did it by his own direct volition.<sup>5</sup> Plainly, therefore, a party who inspired his agent to procure a contract by fraud, sustains the same relation to it as if the fraud were his personal act.<sup>6</sup> Again,—

<sup>1</sup> *Watts v. Devor*, 1 Grant, Pa. 267; *Farmers' Mutual Ins. Co. v. Taylor*, 23 Smith, Pa. 342; *Davis v. Lane*, 10 N. H. 156; *Miller v. Moore*, 1 Cranch C. C. 471.

<sup>2</sup> *Lamothe v. St. Louis Marine Railway and Dock Co.*, 17 Misso. 204; *Hancock v. Byrne*, 5 Dana, 514; *Beard v. Kirk*, 11 N. H. 397; *Diversey v. Kellogg*, 44 Ill. 114; *Longworth v. Conwell*, 2 Blackf. 469; *Baltimore v. Eschbach*, 18 Md. 276; *Planters Bank v. Cameron*, 3 Sm. & M. 609; *Munn v. Commission Co.*, 15 Johns. 44; *Trueman v. Loder*, 11 A. & E. 589.

<sup>3</sup> *Williams v. Birbeck, Hoffman*, 359.

<sup>4</sup> *Hodge v. Combs*, 1 Black, 192; *National Life Ins. Co. v. Minch*, 53 N. Y. 144.

<sup>5</sup> *United States v. Voss*, 1 Cranch C. C. 101; 1 Bishop Crim. Law, § 631; *Moir v. Hopkins*, 16 Ill. 313; *Exum v. Brister*, 85 Missis. 391.

<sup>6</sup> *Lunday v. Thomas*, 26 Ga. 537-544; *Lewis v. The State*, 21 Ark. 209; *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254.

§ 387. **Unauthorized Fraud in Authorized Agency.**—In civil jurisprudence, the doctrine goes still further. If, while the agent is acting in his agency, he makes fraudulent representations, the principal is responsible for them as his own, though he did not authorize or expect them. Having employed the agent to do the thing, he must bear whatever comes from the manner of doing.<sup>1</sup>

§ 388. **Not in Line of Agency.**—For an independent fraud, by a special agent, not within the scope of his agency, the principal is not responsible.<sup>2</sup> But,—

§ 389. **Ratified by Principal.**—If one, however innocently, accepts the benefit of a contract made for him or for his advantage by another, or otherwise ratifies it, he then becomes responsible for any fraud which entered into its procurement, the same as though committed in person.<sup>3</sup>

§ 390. **Fraud on Agent.**—A fraud practised on an agent is, in law, a fraud upon his principal.<sup>4</sup>

§ 391. *The Doctrine of this Chapter restated.*

Men, living in communities, are necessarily agents and principals in their own and each other's transactions, almost continually. There never was a person, of adequate capacity, who has not been both. Hence the relation of principal and agent comes often under review by our courts. And, to it, the following propositions apply:—

<sup>1</sup> *Willis v. Martin*, 4 T. R. 39, 66; *Locke v. Stearns*, 1 Met. 560; *Robinson v. Walton*, 58 Misso. 380; *Durst v. Burton*, 47 N. Y. 167; *Jeffrey v. Bigelow*, 18 Wend. 518; *Smith v. Tracy*, 36 N. Y. 79; *Johnson v. Barber*, 5 Gilman, 425; *Henderson v. Railroad*, 17 Texas, 560; *Wright v. Calhoun*, 19 Texas, 412; *Morton v. Scull*, 23 Ark. 289; *Union Bank v. Campbell*, 4 Humph. 894.

<sup>2</sup> *Kennedy v. Parke*, 2 C. E. Green, 415; *Fellows v. Oneida*, 36 Barb. 655; *Echols v. Dodd*, 20 Texas, 190; *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254.

<sup>3</sup> *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Elwell v. Chamberlin*, 31 N. Y. 611.

<sup>4</sup> *May v. Magee*, 66 Ill. 112.

First, any act of contracting, which a man can do personally, he can do, in some form, by agent.

Secondly, no formal authorization of the agent is necessary, unless made so by some special rule of law; but, in fact, he must be authorized, or his act must be afterward ratified by the assumed principal, or the conduct of the principal must have been such as to estop him to deny the agency.

Thirdly, the agent stands in the place of the principal; who, therefore, is bound by his contracting, and is entitled to avail himself of it, the same as though done by himself.

Fourthly, if the agent acts as a principal, he is personally bound; otherwise, doing no more than is incumbent on him as agent, he incurs no individual liability.

Fifthly, if persons deal with an agent, justly supposing him to be a principal, they may still have their remedies against the principal, when informed of their mistake; but, if they know how the fact is while making the contract, yet choose to deal with the agent as principal, they cannot afterward recede from their own voluntary bargain, and come upon the principal.

Sixthly, by the common law, some exceptions to these rules have been established for specialties; and, by statutes, there have been some as to simple contracts.

## CHAPTER XXIII.

## CONTRACTS BY PERSONS IN PARTNERSHIP.

§ 392. **On what Principle.**—The principle on which contracts by persons in partnership proceed is, that, within the scope of the business of the firm, the partner who makes the contract is the agent for the rest, while he acts personally for himself.<sup>1</sup> And this doctrine of agency, precisely as described in the last chapter, pervades and controls the entire subject. Thus, —

§ 393. **One Partner's Power.**—As to third persons, a single partner can alone bind the firm by any simple contract within the sphere of its operations as presented to the public.<sup>2</sup> But, as between its members, the authority may be withheld, or it may be revoked by a dissenting member; and then a third person, who has notice of this, cannot make with the disqualified partner a contract by which the firm will be bound.<sup>3</sup> But these are mere deductions from the law of agency as elucidated in the last chapter. Again, —

§ 394. **Undisclosed Partners.**—We there saw, that, if an agent making a contract in his own name does not disclose his agency, his principal, if afterward discovered, is

<sup>1</sup> Smith Con. 2d Eng. ed. 339; Baird's Case, Law Rep. 5 Ch. Ap. 725, 733; Yeager *v.* Wallace, 7 Smith, Pa. 365; Loudon Savings Fund Society *v.* Hagerstown Savings Bank, 12 Casey, Pa. 498; Bowman *v.* Cecil Bank, 3 Grant, Pa. 33.

<sup>2</sup> Catlin *v.* Gilders, 3 Ala. 536; Frost *v.* Hanford, 1 E. D. Smith, 540; Livingston *v.* Roosevelt, 4 Johns. 251.

<sup>3</sup> Langan *v.* Hewett, 18 Sm. & M. 122; Johnston *v.* Dutton, 27 Ala. 245; Leavitt *v.* Peck, 8 Conn. 124; Bull *v.* Harris, 18 B. Monr. 195.

liable to be sued thereon.<sup>1</sup> In like manner, therefore, when a man contracts with a member of a firm about a partnership matter, but does not know of the partnership, and supposes himself to be giving credit merely to the individual,—or deals with an ostensible firm while there is in fact a silent partner,—he may, if he chooses, on discovering the facts, sue the firm in the one case, or the whole firm including the silent partner in the other, upon the contract.<sup>2</sup> In like manner,—

§ 395. **Continued.**—A suit on behalf of the firm,<sup>3</sup> in such a case, against the man contracting, may be brought either in the name of the entire firm, or of the individual, or part of the firm, with whom the contract was in fact made.<sup>4</sup> So,—

§ 396. **Notice on Retiring.**—As an ordinary principal must, on putting an end to an agency, give notice thereof in order to avoid liability to third persons dealing with the agent;<sup>5</sup> in like manner, a retiring partner must give notice, in order to avoid a like liability to those who subsequently deal with the remaining members of the firm.<sup>6</sup>

§ 397. **How Sign.**—A partner, in executing a simple contract in writing to bind the firm, usually signs the firm's name. But it is equally good in law, if, instead of this, he writes the names of the individual partners.<sup>7</sup> For practical

<sup>1</sup> *Ante*, § 356, 359.

<sup>2</sup> *Beckham v. Drake*, 9 M. & W. 79; *Holden v. Bloxum*, 35 Missis. 381; *Reynolds v. Cleveland*, 4 Cow. 282; *Roth v. Moore*, 19 La. An. 86; *Tucker v. Peaslee*, 36 N. H. 167; *Baxter v. Clark*, 4 Ire. 127; *Given v. Albert*, 5 Watts & S. 333; *Bisel v. Hobbs*, 6 Blackf. 479; *Griffith v. Buffum*, 22 Vt. 181; *Dishon v. Schorr*, 19 Ill. 59.

<sup>3</sup> *Ante*, § 356, 360, 361.

<sup>4</sup> *Cothay v. Fennell*, 10 B. & C. 671; *Ward v. Leviston*, 7 Blackf. 466; *Wood v. O'Kelley*, 8 Cush. 406; *Clarkson v. Carter*, 3 Cow. 84; *Clark v. Miller*, 4 Wend. 628; *Rogers v. Kichline*, 12 Casey, Pa. 293; *Curtis v. Belknap*, 21 Vt. 438; *Trott v. Irish*, 1 Allen, 481.

<sup>5</sup> *Ante*, § 268.

<sup>6</sup> *Kenney v. Altvater*, 27 Smith, Pa. 34; *Carmichael v. Greer*, 55 Ga. 116.

<sup>7</sup> *Patch v. Wheatland*, 8 Allen, 102; *Holden v. Bloxum*, 35 Missis. 381;

reasons, a seal should not be attached unless required by law; and, when it is, the proper formalities should be observed, as will now be explained.

§ 398. *Instruments under Seal:—*

**How practically.**—Whatever be the strict law as to the various possible methods of executing a specialty by a partnership, practically the individual names of the partners should be given in the body of the instrument, with the recitation that they are partners composing a firm which should be named; and each partner should with his own hand subscribe his name opposite his several seal. This method is certainly right, the proof is easy, and no unpleasant questions of law or fact can follow.

§ 399. **Power of One Partner.**—Since a partner, who acts for the rest of the firm as well as himself, does so merely because he is the agent of the other members, who are his principals,<sup>1</sup> the result necessarily follows that he cannot bind them by a sealed instrument unless his authority is under seal.<sup>2</sup> Nor is it different though the partnership articles are sealed; “unless,” said Lord Kenyon, “a particular power be given for that purpose.”<sup>3</sup> If the partners are together, and one with the concurrence of the rest signs

*McGregor v. Cleveland*, 9 Wend. 475. And see *Maynard v. Fellows*, 43 N. H. 255.

<sup>1</sup> *Ante*, § 392.

<sup>2</sup> *Ante*, § 327.

<sup>3</sup> *Harrison v. Jackson*, 7 T. R. 207, 210; *McCullough v. Somerville*, 8 Leigh, 415; *Gerard v. Basse*, 1 Dall. 119; *Trimble v. Coons*, 2 A. K. Mar. 375; *Lambden v. Sharp*, 9 Humph. 224; *Hart v. Withers*, 1 Pa. 285; *McDonald v. Eggleston*, 26 Vt. 154; *Pierson v. Hooker*, 3 Johns. 68; *Donaldson v. Kendall*, 2 Ga. Dec. 227; *Napier v. Catron*, 2 Humph. 534; *Morris v. Jones*, 4 Harring. Del. 428; *Henry v. Gates*, 26 Misso. 315. On the other hand, not quite consistently with this doctrine or other sound legal principle, there are cases which seem to hold, that, if there is a prior oral authority or subsequent oral ratification from the other partners, the instrument will constitute the firm's deed. *Grady v. Robinson*, 28 Ala. 289; *Herbert v. Hanrick*, 16 Ala. 581; *Drumwright v. Philpot*, 16 Ga. 424; *Shirley v. Fearne*, 33 Missis. 653; *Haynes v. Seachrest*,

the firm's name opposite several seals or one, it is good;<sup>1</sup> because, by reason of the presence,<sup>2</sup> the act of the one is the act of all.<sup>3</sup>

**§ 400. Not so executed as to be Firm's Deed.**—The adjudications are discordant as to the effect of an instrument executed by one member as the deed of the firm, yet not binding the others as a deed for the want of sealed authority. We have seen,<sup>4</sup> that an unauthorized seal may be rejected as surplusage, leaving the instrument good as a simple contract. And a written instrument will always be construed, if possible, in a way to carry out the purpose of the parties and give it legal effect.<sup>5</sup> Applying these principles, therefore, if the instrument is one to which the law requires a seal, it will be void as to the parties not signing it, but valid as the sole deed of the other party; if no seal is required by law, then it will be the simple contract of, at least, the parties not signing. As to the party signing, the difference between a simple contract and a specialty is so great, and the incongruity of a part of a firm contracting by deed and the rest by parol is so considerable, that his seal should also be

13 Iowa, 455; *Ely v. Hair*, 16 B. Monr. 230; *Pike v. Bacon*, 21 Maine, 280; *Cady v. Sheperd*, 11 Pick. 400; *Clement v. Brush*, 3 Johns. Cas. 180; *Swan v. Stedman*, 4 Met. 548; *Fox v. Norton*, 9 Mich. 207; *Gwinn v. Rooker*, 24 Misso. 290; *Smith v. Kerr*, 3 Comst. 144; *Gram v. Seton*, 1 Hall, N. Y. 262; *Bond v. Aitkin*, 6 Watts & S. 165; *Johns v. Battin*, 6 Casey, 84; *Lowery v. Drew*, 18 Texas, 786; *Wilson v. Hunter*, 14 Wis. 688.

<sup>1</sup> *Ball v. Dunsterville*, 4 T. R. 313; *Day v. Lafferty*, 4 Ark. 450; *Lee v. Onstott*, 1 Ark. 206; *Henderson v. Barbee*, 6 Blackf. 26; *Price v. Alexander*, 2 Greene, Iowa, 427.

<sup>2</sup> *Ante*, § 328.

<sup>3</sup> And see *United States v. Astley*, 3 Wash. C. C. 508; *Fleming v. Dunbar*, 2 Hill, S. C. 532; *Modisett v. Lindley*, 2 Blackf. 119; *Posey v. Bullitt*, 1 Blackf. 99; *Fichthorn v. Boyer*, 5 Watts, 159; *Mackay v. Bloodgood*, 9 Johns. 285; *Little v. Hazzard*, 5 Haring. Del. 291.

<sup>4</sup> *Ante*, § 377.

<sup>5</sup> 2 *Saund. Wms.* ed. 96, note; *Randel v. Chesapeake and Delaware Canal*, 1 *Harring. Del.* 151; *Stockton v. Turner*, 7 J. J. Mar. 192; *Bush v. Watkins*, 14 *Beav.* 425; *Milhourn v. Simpson*, 2 *Wils.* 22; *post*, § 582.

rejected ; leaving the whole to be treated as an unsealed instrument. So the question is in principle ; some of the discordant decisions are referred to in a note.<sup>1</sup>

§ 401. **Release.** — A release by one of two joint obligees discharges the obligation. And, on this principle, if one partner signs and seals a composition deed, it will be effectual.<sup>2</sup>

§ 402. *The Doctrine of this Chapter restated*

Partners bind one another by contract on the same principle, and substantially in the same manner, as does an ordinary agent his principal. The partnership itself confers the agency. But such agency does not extend to the making of specialties ; which, therefore, though relating to the business of the firm, should be executed in the same manner as if the parties were not partners. Undoubtedly, however, it is competent for a business firm, in their articles of copartnership, by express provision to authorize each partner, or a particular one only, to make contracts under seal in behalf of the firm, provided the articles are themselves under seal. This would not be convenient for persons dealing with the firm ; because, in matter of prudence, he who accepts a sealed instrument, executed by any agent, should have under his own control the means of proving the agency.

<sup>1</sup> *Banorgee v. Hovey*, 5 Mass. 11; *Dillon v. Brown*, 11 Gray, 179; *Milton v. Mosher*, 7 Met. 244; *Schmertz v. Shreeve*, 12 Smith, Pa. 457; *Lucas v. Darien Bank*, 2 Stew. 280; *Human v. Cuniffe*, 32 Misso. 316; *Gunter v. Williams*, 40 Ala. 561; *McCullough v. Somerville*, 8 Leigh, 415; *Daniel v. Toney*, 2 Met. Ky. 523; *Hoskinson v. Eliot*, 12 Smith, Pa. 393; *Dodge v. McKay*, 4 Ala. 346; *Scott v. Dansby*, 12 Ala. 714; *Massey v. Pike*, 20 Ark. 92; *Smith v. Tupper*, 4 Sm. & M. 261; *Turbeville v. Ryan*, 1 Humph. 118.

<sup>2</sup> *Met. Con.* 125, 126; *Bruen v. Marquand*, 17 Johns. 58; *Smith v. Stone*, 4 Gill & J. 310; *Pierson v. Hooker*, 3 Johns. 68; *Morse v. Bellows*, 7 N. H. 549; *Crutwell v. DeRosset*, 5 Jones, N. C. 263; *McBride v. Hagan*, 1 Wend. 326; *Wells v. Evans*, 20 Wend. 251; *Evans v. Wells*, 22 Wend. 324.

## CHAPTER XXIV.

## THE CONSIDERATION.

- § 403-408. Introductory Explanations.
- 409-427. General View of the Consideration.
- 428-431. Where the Contract is wholly executory.
- 432-437. Wholly executed.
- 438, 439. Executed in Part.
- 440-445. Consideration executed.
- 446-453. Waiver as to Consideration.
- 454. Doctrine of the Chapter restated.

§ 403. **How differs from Motive.**—The motives to promises are numerous. One motive, for example, is to confer a benefit on the promisee; springing from particular affection, or from general benevolence. Another is to obtain the *quid pro quo*; that is, the consideration, in exchange for which the promise is given. So that, though the consideration may be deemed a motive, it is one only among many motives.<sup>1</sup>

§ 404. **Value.**—In a suit at law, the judgment for a successful plaintiff is, that he recover of the defendant a specified number of dollars and cents; or that he be put in possession of the thing in controversy, but it must be of a sort which can be estimated in money. Even equity does not take jurisdiction of things which cannot be thus valued. A divorce suit might seem to be a partial exception; but its leading purpose is to determine a status, and a status is deemed to have a value in the currency of the country. An

<sup>1</sup> And see *Philpot v. Gruninger*, 14 Wal. 570; *Rockwell v. Brown*, 54 N. Y. 210.

action, as for slander, to redress an injury to the character, proceeds chiefly on the pecuniary view of the case; and a judgment that the plaintiff recover his lost character was never known. So that a consideration, in the law of contracts, must be a thing, in some sense, of pecuniary value.

**§ 405. "Good" — "Valuable" — "Moral Obligation," etc.** — We have, from the bench, respectful mention of a "moral obligation," and of "love and affection;" each of which may in some instances have led the courts to depart from established principle, and each of which is in various circumstances justly deemed important as repelling any presumption of fraud, and making gifts prompted by it good. But, in general, and probably by the better view universally, a consideration must be something capable of being reduced to a money value, though such value may be indefinite and even slight.<sup>1</sup> To define, therefore, —

**§ 406. How defined.** — A consideration is something, deemed in the law of pecuniary value, in exchange for which the promise in a contract is made. And —

**§ 407. The Doctrine.** — The doctrine, to be illustrated in this chapter, is, that no simple contract is valid without a consideration.<sup>2</sup> We have already seen<sup>3</sup> how it is with

<sup>1</sup> Law books frequently speak of a *good* consideration, in distinction from a *valuable* one; meaning, by the former, blood relationship, or natural affection. Chitty says, that a "good" consideration may be available in a deed of real estate, under some circumstances; but it will never support a simple contract. 1 Chit. Con. 11th Am. ed. 27. And see *Schnell v. Nell*, 17 Ind. 29; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Ford v. Ellinwood*, 3 Met. Ky. 359; *Pennington v. Gittings*, 2 Gill & J. 208; *Hayes v. Kershaw*, 1 Sandf. Ch. 258; *Coggeshall v. Coggeshall*, 2 Strob. 51; *Killough v. Steele*, 1 Stew. & P. 262. We shall not, therefore, have occasion to speak of any other than a "valuable" consideration in the present chapter. Something of "moral obligation" will appear in our next chapter. And see post, § 458.

<sup>2</sup> *Travis v. Duffau*, 20 Texas, 49; *Doebler v. Waters*, 30 Ga. 344; *Lowe v. Bryant*, 32 Ga. 235; *Aldridge v. Turner*, 1 Gill & J. 427; *Tenney v. Prince*, 4 Pick. 385, 7 Pick. 243; *Bailey v. Walker*, 29 Misso. 407; *Lang v. Johnson*, 4 Fost. N. H. 302.

<sup>3</sup> *Ante*, § 23 et seq., 405, note.

contracts under seal. The contracts here treated of are express ones, in distinction from those created by law; but probably the law never creates a contract without a consideration.<sup>1</sup>

**§ 408. How the Chapter divided.** — Our discussion will be in the following order: I. General View of the Consideration; II. Where the Contract is wholly executory (as depending on Mutual Promises); III. Where the Contract is wholly executed; IV. Where the Contract is executed in part; and, especially, V. Where the Consideration is executed; VI. The Waiver of Imperfections in the Consideration.

*I. General View of the Consideration.*

**§ 409. Amount of Value.** — As we have seen,<sup>2</sup> the consideration must be a thing of value. Where an exact sum of money is given, or to be given, by the one party, in return for something not money by the other, or where the thing on neither side is money, the law will not interfere with their estimates of value, but will hold the contract good though the judge or jury should deem the value to be greatly more or less than the parties did. Only on a question of fraud will the real values be taken into the account; then, in a gross case, they may become the controlling circumstance.<sup>3</sup> But, —

<sup>1</sup> *Ante*, § 9.

<sup>2</sup> *Ante*, § 404, 405.

<sup>3</sup> *Newhall v. Paige*, 10 Gray, 866; *Earl v. Peck*, 64 N. Y. 596; *Hunter v. McLaughlin*, 48 Ind. 38; *Merriman v. Lacefield*, 4 Heisk. 209; *McMullen v. Gable*, 47 Ill. 67; *Comstock v. Purple*, 49 Ill. 158; *Duncan v. Sanders*, 50 Ill. 475; *Nash v. Lull*, 102 Mass. 60; *Worth v. Case*, 42 N. Y. 362; *Callaghan v. Callaghan*, 8 Cl. & F. 374; *Groves v. Perkins*, 6 Sim. 576; *Stilwell v. Wilkins*, 280, 282; *Taylor v. Obee*, 3 Price, 88; *Western v. Russell*, 3 Ves. & B. 187; *Murray v. Palmer*, 2 Sch. & Lef. 474, 488; *Clarkson v. Hanway*, 2 P. Wms. 203; *Griffith v. Spratley*, 1 Cox, 388; *Hough v. Hunt*, 2 Ohio, 495; *Green v. Thompson*, 2 Ire. Eq. 365; *White v. Flora*, 2 Tenn. 426; *Hardeman v. Burge*, 10. Yerg. 202; *Knobb v. Lindsay*, 5 Ohio, 468; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Hallett v. Collins*, 10 How. U. S. 174; *Odineal v. Barry*, 24 Missis. 9; *Haines v. Haines*, 6 Md. 435; *McCormick v. Malin*, 5 Blackf. 509.

§ 410. **Two Values fixed by Law.**—Where the law has established the values, as it has of coin and some other things, a particular sum of money, or another thing thus made equal in worth to such sum, is not a consideration for a greater sum, or for a thing which the law has made to be worth more.<sup>1</sup> Thus,—

§ 411. **Fees of Officer.**—If a statute has prescribed an exact fee for the performance of a specified duty by an officer, an agreement with him to pay more is void.<sup>2</sup> Or,—

§ 412. **Taking less than due**—(**Compositions with Creditors.**)—If a man owes another a sum of money ascertained and due, and the creditor accepts a less sum in full satisfaction,<sup>3</sup> or promises to take less,<sup>4</sup> the payment in the one instance is a discharge of only so much as it amounts to, and in the other the promise is void. This is the law of simple contracts; but,—

§ 413. **Release under Seal.**—As a seal implies a consideration,<sup>5</sup> a release under seal to the debtor, or even to one of several joint debtors, without actual payment, will bar a suit for the debt.<sup>6</sup> And,—

<sup>1</sup> *Schaell v. Nell*, 17 Ind. 29; *Bailey v. Day*, 26 Maine, 88. See *Brachan v. Griffin*, 3 Call, 433.

<sup>2</sup> *Burk v. Webb*, 32 Mich. 173; *Morrell v. Quarles*, 35 Ala. 544; *Territory v. King*, 1 Oregon, 106; *Evans v. Trenton*, 4 Zab. 764; *Smith v. Whildin*, 10 Barr, 39; *Kernion v. Hills*, 1 La. An. 419.

<sup>3</sup> *Fitch v. Sutton*, 5 East, 230; *Bunge v. Koop*, 48 N. Y. 225; *Bliss v. Swartz*, 7 Lans. 186; *Bryan v. Foy*, 69 N. C. 45; *Rea v. Owens*, 37 Iowa, 262; *Crawford v. Millspaugh*, 18 Johns. 87; *Heathcote v. Crookshanks*, 2 T. R. 24; *Smith v. Bartholomew*, 1 Met. 276; *Pearson v. Thomason*, 15 Ala. 700; *Bailey v. Day*, 26 Maine, 88; *Harriman v. Harriman*, 12 Gray, 841.

<sup>4</sup> *McKenzie v. Culbreth*, 66 N. C. 534; *Line v. Nelson*, 9 Vroom, 358; *Rose v. Daniels*, 8 R. I. 381; *Moore v. Hylton*, 1 Dev. Eq. 433.

<sup>5</sup> *Ante*, § 23; *Rutherford v. Baptist Convention*, 9 Ga. 54; *Patton v. Ashley*, 3 Eng. 290; *Wing v. Chase*, 35 Maine, 260; *Brewer v. Bessinger*, 25 Missis. 86.

<sup>6</sup> *Schuylkill Navigation Co. v. Harris*, 5 Watts & S. 28; *Bender v. Sampson*, 11 Mass. 42, 44, 45; *Valentine v. Foster*, 1 Met. 520; *Walker v. McCulloch*, 4 Greenl. 421; *Lee v. Lancashire, etc., Railway*, Law Rep. 6 Ch. Ap. 527, 534; *Payler v. Homersham*, 4 M. & S. 423; *Willing v. Peters*, 12 S. & R. 177; *Willoughby v. Backhouse*, 4 D. & R. 539, 2 B. & C. 821. But see *Bruton v. Wooten*, 15 Ga. 570.

**§ 414. Not under Seal—(Consideration of Value not fixed).**—Though a release is not under seal, if, to a partial payment, some consideration however small is added, of a sort the value whereof is not, like money or a fee, fixed by law,<sup>1</sup> or if the whole payment is of a like sort,<sup>2</sup> this, when accepted in full discharge of the debt, will be valid. Thus (a distinction very thin),—

**§ 415. Payment guaranteed.**—Though the payment of a part, which is accepted in full, will not be adequate, even where the debtor is in failing circumstances; yet a guaranty of such part from a responsible third person,<sup>3</sup> or the payment of such part in the third person's notes, which are afterward paid,<sup>4</sup> will operate in law, the parties so agreeing, as a discharge of the whole. So,—

**§ 416. Payment before due—At Different Place.**—If a part is paid before the debt is due,<sup>5</sup> or at a different place from that originally agreed upon,<sup>6</sup> the discharge will be good. Or,—

**§ 417. Sum in Dispute.**—If there is a dispute or doubt as to how much is due, the payment of a sum which the parties agree upon will be adequate in discharge.<sup>7</sup>

<sup>1</sup> Williams *v.* Stanton, 1 Root, 426; Blinn *v.* Chester, 5 Day, 359.

<sup>2</sup> Arnold *v.* Park, 8 Bush, 3; McKenzie *v.* Culbreth, 66 N. C. 534.

<sup>3</sup> Maddux *v.* Bevan, 39 Md. 485; Little *v.* Hobbs, 34 Maine, 57; Boyd *v.* Hitchcock, 20 Johns. 76; Le Page *v.* McCrea, 1 Wend. 164; Kellogg *v.* Richards, 14 Wend. 116; Gunn *v.* McAden, 2 Ire. Eq. 79. There are cases which put this upon the ground that to permit the creditor to sue the debtor would be a fraud on the surety and the other creditors. Steinman *v.* Magnus, 11 East, 390; Smith *v.* Bartholomew, 1 Met. 276, 278. See a similar principle, in Poague *v.* Spriggs, 21 Grat. 220. See, also, Brooks *v.* White, 2 Met. 288; Goodnow *v.* Smith, 18 Pick. 414; Fellows *v.* Stevens, 24 Wend. 294; Keeler *v.* Salisbury, 33 N. Y. 648.

<sup>4</sup> Sanders *v.* Branch Bank, 13 Ala. 353; Webb *v.* Goldsmith, 2 Duer, 413; Frisbie *v.* Larned, 21 Wend. 450; Booth *v.* Smith, 3 Wend. 66.

<sup>5</sup> Arnold *v.* Park, 8 Bush, 3; Bowker *v.* Childs, 3 Allen, 434.

<sup>6</sup> McKenzie *v.* Culbreth, 66 N. C. 534; Smith *v.* Brown, 3 Hawks, 580; Jones *v.* Bullitt, 2 Litt. 49; Fenwick *v.* Phillips, 3 Met. Ky. 87; Jones *v.* Perkins, 29 Missis. 139; Reid *v.* Hibbard, 6 Wis. 175.

<sup>7</sup> Simmons *v.* Almy, 103 Mass. 33; Stearns *v.* Johnson, 17 Minn. 142; Riley

**§ 418. Illegal—Against Public Policy.**—The courts, being established to conserve the law, good morals, and the due order of society, cannot lend their aid to parties conspiring to impede these objects. Therefore a consideration immoral, illegal, or contrary to public policy will not support a contract.<sup>1</sup> But this subject will be more minutely examined in the next chapter.

**§ 419. What concerns the Parties.**—If a consideration, however adequate in itself, in no way concerns the parties either personally or as representing the interests of others,—or, if it is procured neither by one of them nor by any other person in behalf of such one,—it will not support a contract.<sup>2</sup> The common form of this doctrine is, that—

**§ 420. Benefit or Disadvantage.**—The consideration must be something beneficial to the one party, or disadvantageous to the other, or to persons whom the parties represent.<sup>3</sup> Thus,—

*v. Kershaw*, 52 Misso. 223; *Wehrum v. Kuhn*, 61 N. Y. 628; *Snow v. Grace*, 29 Ark. 131; *Palmerton v. Huxford*, 4 Denio, 166; *Taylor v. Nussbaum*, 2 Duer, 302. And see *Sheldon v. Rice*, 30 Mich. 296.

<sup>1</sup> *Tucker v. West*, 29 Ark. 386; *Taylor v. Chester*, Law Rep. 4 Q. B. 309; *Porter v. Jones*, 52 Misso. 399; *Harwood v. Knapper*, 50 Misso. 456; *Stoutenburg v. Lybrand*, 18 Ohio State, 228; *Sternberg v. Bowman*, 103 Mass. 325; *Bailey v. Bussing*, 28 Conn. 455; *Acheson v. Miller*, 2 Ohio State, 203; *Widoe v. Webb*, 20 Ohio State, 431; *Hennessey v. Hill*, 52 Ill. 281; *Pearce v. Brooks*, Law Rep. 1 Ex. 213; *Deans v. McLendon*, 30 Misso. 343; *Bly v. Second National Bank*, 29 Smith, Pa. 453; *Ives v. Bosley*, 35 Md. 262; *Brown v. Brine*, 1 Ex. D. 5.

<sup>2</sup> And see *Stewart v. Hamilton College*, 2 Denio, 403; *Salmon v. Brown*, 6 Blackf. 347; *Bingham v. Kimball*, 17 Ind. 396; *Fugure v. Mutual Society*, 46 Vt. 362; *Philpot v. Gruninger*, 14 Wal. 570; *Page v. Becker*, 31 Misso. 466.

<sup>3</sup> 1 Chit. Con. 11th Am. ed. 28; Met. Con. 163; *Edgeware Highway v. Harrow Gas. Co.*, Law Rep. 10 Q. B. 92, 95, 96; *Currie v. Misa*, Law Rep. 10 Ex. 153, 162; *Buchanan v. International Bank*, 78 Ill. 500; *Coleman v. Eyre*, 45 N. Y. 38; *Glasgow v. Hobbs*, 32 Ind. 440; *Greene v. Bartholomew*, 34 Ind. 235; *Pitt v. Gentle*, 49 Misso. 74; *Williamson v. Clements*, 1 Taunt 528; *Sanford v. Huxford*, 32 Mich. 313; *Neal v. Gilmore*, 29 Smith, Pa. 421; *Conover v. Stillwell*, 5 Vroom, 54; *McCarty v. Blevins*, 5 Yerg. 195; *Tompkins v. Philips*, 12 Ga. 52; *Molyneux v. Collier*, 17 Ga. 46; *Doyle v. Knapp*, 8 Scam.

**§ 421. Extending Time.**—If one owes money to another, and the latter simply promises the former, who accepts the promise, to extend the time of payment, nothing beneficial or detrimental passes from the one to the other, and the promise is void.<sup>1</sup> But an agreement by the debtor to pay an increased rate of interest,<sup>2</sup> or his paying the interest in advance,<sup>3</sup> will support an undertaking by the creditor to extend the time. On the other hand, an extension of time is an adequate consideration for a promise.<sup>4</sup> Again,—

**§ 422. Gratuitous Bailment.**—If a man promises another to carry and deliver for him to a third person, without compensation, an article of personal property, this promise is void because there is no consideration for it.<sup>5</sup> But if he takes the article into his possession, he is then under legal obligation to deliver it; because, should he keep it, he would derive a benefit to himself and cause a disadvantage to another, contrary to his promise.<sup>6</sup>

334; *Warren v. Whitney*, 24 Maine, 561; *Hildreth v. Pinkerton Academy*, 9 *Post. N. H.* 227; *Brown v. Brine*, 1 *Ex. D.* 5, 7.

<sup>1</sup> *Kellogg v. Olmsted*, 25 N. Y. 189; *Bates v. Starr*, 2 *Vt.* 536; *First National Bank v. Church*, 3 *Thomp. & C.* 10; *Van Allen v. Jones*, 10 *Bosw.* 369; *Paramelee v. Thompson*, 45 N. Y. 58.

<sup>2</sup> *Beckner v. Carey*, 44 *Ind.* 89; *Knapp v. Mills*, 20 *Texas*, 123; *Clarkson v. Creely*, 35 *Miss.* 95. See *Kinsey v. Wallace*, 36 *Cal.* 462.

<sup>3</sup> *Dickerson v. Ripley*, 6 *Ind.* 128; *Wright v. Bartlett*, 48 *N. H.* 548. And see *Warner v. Campbell*, 26 *Ill.* 282; *Harbert v. Dumont*, 3 *Ind.* 346.

<sup>4</sup> *Hockenbury v. Meyers*, 5 *Vroom*, 346; *Mechanics' etc., Bank v. Wixson*, 42 *N. Y.* 438; *Cary v. White*, 52 *N. Y.* 138; *Underwood v. Hossack*, 38 *Ill.* 208; *Raymond v. Smith*, 5 *Conn.* 555; *Russell v. Babcock*, 14 *Maine*, 188; *Cook v. Duvall*, 9 *Gill*, 460. Forbearance "for a short time" is too indefinite; but, "for a reasonable time," is good. *Lonsdale v. Brown*, 4 *Wash. C. C.* 148; *Sidwell v. Evans*, 1 *Pa.* 385.

<sup>5</sup> *Coggs v. Bernard*, 2 *Ld. Raym.* 909, 911, 919. And see *Elsee v. Gatward*, 5 *T. R.* 143; *Dartnall v. Howard*, 4 *B. & C.* 145.

<sup>6</sup> The correctness of this doctrine is settled by the authorities beyond dispute, but the same reason is not always given as in the text. *Graves v. Ticknor*, 6 *N. H.* 537; *Colyar v. Taylor*, 1 *Coldw.* 372; *Beardslee v. Richardson*, 11 *Wend.* 25; *Bland v. Womack*, 2 *Murph.* 373; *Delaware Bank v. Smith*, *Edm. Sel. Cas.* 351; *Lloyd v. Barden*, 3 *Strob.* 343; *Clark v. Gaylord*, 24 *Conn.* 484; *Jenkins v. Motlow*, 1 *Sneed, Tenn.* 248; *Persch v. Quiggle*, 7 *Smith, Pa.* 247; *Gulledge v. Howard*, 28 *Ark.* 61; *Dart v. Lowe*, 5 *Ind.* 131; *Johnson v. Rey-*

§ 423. **Other Illustrations.**—The books are full of illustrations of what is, and what is not, a consideration for a promise. Thus,—

§ 424. **Marriage.**—Marriage is deemed a thing of value, and is therefore an adequate consideration for a promise;<sup>1</sup> but, if a man has already agreed to marry a woman, her mere expectation that he will fulfill his agreement will not support a fresh promise from him.<sup>2</sup>

§ 425. **Mistake.**—A deed supposed to convey land, but conveying nothing;<sup>3</sup> forbearance to one, when the supposed cause of action is without foundation in law;<sup>4</sup> an obligation believed to be legal, but not so in truth, and the question not even doubtful;<sup>5</sup> a patent apparently good, but really void for the want of novelty and utility;<sup>6</sup>—these are specimens of apparent considerations, without substance, and therefore not adequate to support a promise.<sup>7</sup> If a suit on the promise is brought, the defence is based on what is termed a—

§ 426. **Failure of Consideration.**—And, in these and

nolds, 3 Kan. 257; *Coggs v. Bernard*, *supra*; *Met. Con.* 164–166, and cases there cited.

<sup>1</sup> 1 *Bishop Mar. Women*, § 775, 776; *Wright v. Wright*, 54 N. Y. 437; *Wall v. Scales*, 1 *Dev. Eq.* 476.

<sup>2</sup> *Raymond v. Sellick*, 10 Conn. 480, 483.

<sup>3</sup> *Murphy v. Jones*, 7 Ind. 529. See *Campbell v. Medbury*, 5 Bis. 33; *Friewood v. Pierce*, 17 Ind. 461; *Sheldon v. Harding*, 44 Ill. 68; *Ellery v. Cunningham*, 1 Met. 112.

<sup>4</sup> *Palfrey v. Portland*, etc., *Railroad*, 4 *Allen*, 55, 57; *Sharpe v. Rogers*, 12 *Minn.* 174; *Strahn v. Hamilton*, 38 *Ind.* 57.

<sup>5</sup> *Logan v. Mathews*, 6 *Barr*, 417; *Jarvis v. Sutton*, 3 *Ind.* 289. See *Fleming v. Ramsey*, 10 *Wright, Pa.* 252; *Allen v. Prater*, 30 *Ala.* 458; *Ott v. Garland*, 7 *Misso.* 28.

<sup>6</sup> *First National Bank v. Sturgis*, 8 *Kan.* 660; *Bierce v. Stocking*, 11 *Gray*, 174; *Lester v. Palmer*, 4 *Allen*, 145; *Cross v. Huntley*, 13 *Wend.* 335; *Geiger v. Cook*, 3 *Watts & S.* 266; *Vaughan v. Porter*, 16 *Vt.* 266; *Clough v. Patrick*, 37 *Vt.* 421; *Dickinson v. Hall*, 14 *Pick.* 217.

<sup>7</sup> For other illustrations, see *Hocker v. Gentry*, 3 *Met. Ky.* 463; *Wentworth v. Wentworth*, 5 *N. H.* 410; *Cabot v. Haskins*, 3 *Pick.* 83; *Long v. Towle*, 42 *Misso.* 545; *Ehle v. Judson*, 24 *Wend.* 97; *Crosby v. Wood*, 2 *Selden*, 369; *Wood v. Schlater*, 24 *La. An.* 284; *Strong v. Courtney*, 6 *Mod.* 265.

other like cases, where the supposed consideration has failed, any money paid during the continuance of the mistake may be recovered back.<sup>1</sup> But,—

**§ 427. Absence of Mistake — Subsequent Depreciation.**—If the parties are in no degree mistaken, and the thing is exactly what they supposed it to be,—and there is no fraud,—the law, not undertaking to interfere with their bargain,<sup>2</sup> will hold the consideration to be good. Especially will this be so though there is a subsequent depreciation of value, or failure in the thing;<sup>3</sup> as, where during slavery one bought a slave on credit, but before the time of payment arrived slavery was abolished, his liability was adjudged not to be extinguished.<sup>4</sup> So, if one gives his note to the mother of a bastard child, in discharge of an obligation for its support, the note remains good though the child dies.<sup>5</sup> And if, after a patent is sold on credit, improvements are made rendering it valueless, this is no defence to a suit for the purchase money.<sup>6</sup>

## II. *Where the Contract is wholly Executory.*

**§ 428. What.**—The only case of a contract wholly executory—that is, executory on both sides—is where there are—  
**Mutual Promises.**—A promise of a thing of value is

<sup>1</sup> Met. Con. 219; Add. Con. 7th Eng. ed. 232; 2 Chit. Con. 11th Am. ed. 921; Chapman *v.* Brooklyn, 40 N. Y. 372; Foss *v.* Richardson, 15 Gray, 303; Darst *v.* Brockway, 11 Ohio, 462; Spring *v.* Coffin, 10 Mass. 31; Wharton *v.* O'Hara, 2 Nott & McC. 65; Pettibone *v.* Roberts, 2 Root, 258; Steele *v.* Hobbs, 16 Ill. 59; Woodward *v.* Fels, 1 Bush, 162; Griggs *v.* Morgan, 9 Allen, 37; Hotchkiss *v.* Judd, 12 Allen, 447; Leach *v.* Tilton, 40 N. H. 473; Putnam *v.* Westcott, 15 Johns. 73; Rice *v.* Peet, 15 Johns. 503; Smith *v.* McCluskey, 45 Barb. 610; French *v.* Millard, 2 Ohio State, 44.

<sup>2</sup> *Ante*, § 407.

<sup>3</sup> Smith *v.* Gower, 2 Duvall, 17; Pollard *v.* Lyman, 1 Day, 156; Gore *v.* Mason, 18 Maine, 84; Kerr *v.* Lucas, 1 Allen, 279; Perry *v.* Buckman, 33 Vt. 7; Byrne *v.* Cummings, 41 Missis. 192; Fay *v.* Richards, 21 Wend. 626.

<sup>4</sup> Dowdy *v.* McLellan, 52 Ga. 408.

<sup>5</sup> Potter *v.* Earnest, 45 Ind. 416.

<sup>6</sup> Harmon *v.* Bird, 22 Wend. 113.

itself valuable when made on a consideration; so that, if two persons simultaneously promise, each to the other, some valuable thing, this constitutes a good contract. The promise of the one is the consideration for that of the other.<sup>1</sup> But—

§ 429. **By one only.**—A promise by one, with nothing in return, is void;<sup>2</sup> as, if he undertakes in writing to convey land to another who neither agrees to buy nor pays anything for the promise,<sup>3</sup> or to remain with and learn a trade of another who does not agree to teach.<sup>4</sup> But,—

§ 430. **Both bound or neither.**—If the former makes an offer and the latter accepts it, the contract becomes thereby perfected.<sup>5</sup> In other words, a contract resting on mutual promises will bind both parties or neither.<sup>6</sup>

§ 431. **Simultaneous.**—If the promise of each is made at a different time from that of the other, though on the same day, and the two are not connected, both are void. In form or effect they must be simultaneous.<sup>7</sup>

### III. *When the Contract is wholly Executed.*

§ 432. **In General.**—A contract executed on both sides is ended; and, in general, no questions concerning it remain.

<sup>1</sup> *Funck v. Hough*, 29 Ill. 145; *Downey v. Hinchman*, 25 Ind. 453; *Phillips v. Preston*, 5 How. U. S. 278; *Leach v. Keach*, 7 Iowa, 232; *Rippey v. Friede*, 26 Misso. 523; *Hartzell v. Saunders*, 49 Misso. 433; *Coleman v. Eyre*, 45 N. Y. 38; *Nunnally v. White*, 3 Met. Ky. 584; *Babcock v. Wilson*, 17 Maine, 372; *Whitehead v. Potter*, 4 Ire. 257; *Appleton v. Chase*, 19 Maine, 74; *Byrd v. Fox*, 8 Misso. 574; *Congregational Society v. Perry*, 6 N. H. 164; *George v. Harris*, 4 N. H. 533; *Briggs v. Sizer*, 30 N. Y. 647; *Forney v. Shipp*, 4 Jones, N. C. 527; *Nott v. Johnson*, 7 Ohio State, 270; *Abrams v. Suttles*, Busbee, 99; *Barringer v. Warden*, 12 Cal. 311; *Missisquoi Bank v. Sabin*, 48 Vt. 289.

<sup>2</sup> *Thorne v. Deas*, 4 Johns. 84.

<sup>3</sup> *Bean v. Burbank*, 16 Maine, 458; *Burnet v. Bisco*, 4 Johns. 235.

<sup>4</sup> *Lees v. Whitcomb*, 5 Bing. 34, 2 Moore & P. 86, 3 Car. & P. 289.

<sup>5</sup> *Goodpaster v. Porter*, 11 Iowa, 161; *Thomason v. Dill*, 30 Ala. 444; *Boies v. Vincent*, 24 Iowa, 387.

<sup>6</sup> *Townsend v. Fisher*, 2 Hilton, 47; *Ewins v. Gordon*, 49 N. H. 444. And see *Jenkins v. Williams*, 16 Gray, 158.

<sup>7</sup> *Livingstone v. Rogers*, 1 Caines, 583; *Keep v. Goodrich*, 12 Johns. 397; *Tucker v. Woods*, 12 Johns. 190; *James v. Fulcrod*, 5 Texas, 512.

But sometimes implied promises grow out of what has been done under express ones. This subject has already been considered under other heads;<sup>1</sup> yet a few words further, partly by way of repetition, seem desirable.

**§ 433. Without Consideration.**—Though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts<sup>2</sup> executed, the property in the thing, whether money or a chattel, is transferred, and it cannot be reclaimed.<sup>3</sup> Of this, a common illustration is a —

**§ 434. Gift — (Delivery.)**—A mere promise of a thing to one is void for want of consideration, and words of present gift are only a promise.<sup>4</sup> But when the promise is executed by the delivery of the thing, the imperfection in the contract of gift is cured, and the thing cannot be reclaimed.<sup>5</sup> And, —

**§ 435. Under Seal without Delivery.**—As delivery is not essential to a sale of personal property where no rights of third persons are concerned;<sup>6</sup> so it is not to a gift, if made by a writing under seal, which imports a consideration.<sup>7</sup> But, —

<sup>1</sup> See ante, § 95 et seq., 188 et seq., 185 et seq., 425-427.

<sup>2</sup> Ante, § 407, 427.

<sup>3</sup> *Matthews v. Smith*, 67 N. C. 374; *Newell v. March*, 8 Ire. 441; *Hubbard v. Hickman*, 4 Bush, 204.

<sup>4</sup> *Bremer v. Harvy*, 72 N. C. 176; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Madison v. Shockley*, 41 Iowa, 451; *Morse v. Low*, 44 Vt. 561; *Pearson v. Pearson*, 7 Johns. 26; *Phelps v. Pond*, 23 N. Y. 69; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Johnson v. Stevens*, 22 La. An. 144; *Spencer v. Vance*, 57 Misso. 427.

<sup>5</sup> *Faxon v. Durant*, 9 Met. 389; *Camp's Appeal*, 86 Conn. 88; *Succession of De Pouilly*, 22 La. An. 97; *Rockwood v. Wiggan*, 16 Gray, 402; *Gardner v. Merritt*, 32 Md. 78; *Ellis v. Secor*, 81 Mich. 185; *Smith v. Smith*, 7 Car & P. 401; *Bond v. Bunting*, 28 Smith, Pa. 210; *Marsh v. Fuller*, 18 N. H. 360; *Hillebrant v. Brewer*, 6 Texas, 45.

<sup>6</sup> *McCoy v. Moss*, 5 Port. 88; *Visher v. Webster*, 13 Cal. 58; *Sidwell v. Lobly*, 27 Ill. 438; *Ingersoll v. Kendall*, 18 Sm. & M. 611; *Burt v. Dutcher*, 34 N. Y. 493; *Hooban v. Bidwell*, 16 Ohio, 509; *Ludwig v. Fuller*, 17 Maine, 162; *post*, § 547.

<sup>7</sup> *McCutchen v. McCutchen*, 9 Port. 650; *Irons v. Smallpiece*, 2 B. & Ald. 551, 553; *Horn v. Gartman*, 1 Fla. 63; *Hannon v. The State*, 9 Gill, 440. See

§ 436. **Mistake.**—If no gift was intended, and the whole transaction grew out of a mistaken belief that there was a consideration, the result, we have already seen,<sup>1</sup> will be different. Also,—

§ 437. **Illegal, against Public Policy, etc.**—If the consideration was illegal<sup>2</sup> or against public policy, distinctions will arise, already explained.<sup>3</sup>

#### IV. *Where the Contract is Executed in Part.*

§ 438. **New Consideration.**—If a contract, imperfect for want of consideration, is in part executed,—then, if the contract is renewed on sufficient consideration,—the past as well as the future is thereby made secure.<sup>4</sup> Thus,—

§ 439. **Past and Future Support.**—An agreement to pay for the support of a child, both past and future, in consideration of a promise to continue the child's nurture, is binding equally as to board already furnished and to future board.<sup>5</sup>

#### V. *Where the Consideration is Executed.*

§ 440. **Distinction important.**—Of contracts executed in part, those in which the consideration is executed, but not the rest, require the most careful attention. The distinction is of the first importance.

§ 441. **Gift not a Consideration.**—If a man makes a gift of a thing to another, he cannot go back on his own act and compel payment.<sup>6</sup> Therefore what has been given, or

Butler *v.* Scofield, 4 J. J. Mar. 189; Gordon *v.* Wilson, 4 Jones, N. C. 64; McEwen *v.* Troost, 1 Snead, Tenn. 186; Abbott *v.* Williams, 2 Brev. 38.

<sup>1</sup> *Ante*, § 425, 426.

<sup>2</sup> Kerr *v.* Birnie, 25 Ark. 225.

<sup>3</sup> *Ante*, § 140-146.

<sup>4</sup> Met. Con. 201; Loomis *v.* Newhall, 15 Pick. 159; Andrews *v.* Ives, 3 Conn. 368.

<sup>5</sup> Wiggins *v.* Keizer, 6 Ind. 252.

<sup>6</sup> University *v.* McNair, 2 Ire. Eq. 605.

otherwise voluntarily paid, or transferred, with full knowledge of the facts, without expectation of any thing further in return, as already explained,<sup>1</sup> or with no legal liability assumed at the time on the other side, can be no consideration for a fresh promise.<sup>2</sup> Therefore —

§ 442. **Past Consideration.** — It is a sort of general doctrine that a past and executed consideration will not sustain a promise.<sup>3</sup> But the past and present may be so connected that it will. Thus, —

§ 443. **At Request.** — If what has been done was at the request of the promisor, it will sustain the promise;<sup>4</sup> because, as the reader perceives, though the request, the doing, and the promise may have been on different days, or even in different years, the whole thus becomes one transaction. And, —

§ 444. **Implied Request.** — Where the evidence or circumstances do not clearly show that the executed consideration was a gratuity, or was something else which cast no legal obligation on the promisor, and out of which the law created no promise, the jury under direction of the court may infer, as of fact or of law, a previous request, to satisfy the justice of the particular case.<sup>5</sup> Of course, —

§ 445. **Previous Obligation.** — If, under the circumstances, the law had created a promise when the consideration passed,<sup>6</sup> — as, if a benefit had been conferred on the

<sup>1</sup> *Ante*, § 427, 433, 434.

<sup>2</sup> *Watson v. Dunlap*, 2 Cranch C. C. 14; *Bulkley v. Landon*, 2 Conn. 404; *Eastwood v. Kenyon*, 11 A. & E. 438.

<sup>3</sup> *Ante*, § 431; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick 159; *Barlow v. Smith*, 4 Vt. 189; *Comstock v. Smith*, 7 Johns. 87; *Tomlinson v. Smith*, 2 Iowa, 39.

<sup>4</sup> *Hunt v. Bate*, 3 Dy. 272 *a*; *Lamplleigh v. Brathwait*, Hob. 105 *b*; *Carson v. Clark*, 1 Scam. 118; *Comstock v. Smith*, 7 Johns. 87; *Allen v. Woodward*, 2 Fost. N. H. 544; *Alcinbrook v. Hall*, 2 Wils. 309; *Tappin v. Broster*, 1 Car. & P. 112.

<sup>5</sup> *Oatfield v. Waring*, 14 Johns. 188; *Hicks v. Burhans*, 10 Johns. 243; *Wilson v. Edmonds*, 4 Fost. N. H. 517; *Doty v. Wilson*, 14 Johns. 378.

<sup>6</sup> *Ante*, § 72 et seq.; *Exall v. Partridge*, 8 T. R. 308.

promisor and accepted, with no evidence of its being a gratuity,<sup>1</sup>—or, if the promise is made in discharge of a subsisting legal obligation, however it may have originated in some prior transaction,<sup>2</sup>—the consideration will require no previous request to make it adequate; though, in mere form of technical pleading, such an allegation may be necessary.<sup>3</sup>

## VI. *The Waiver of Imperfections in the Consideration.*

**§ 446. Waiving Legal Rights in General.**—The doctrine is familiar, that no man is compellable to stand on a right which the law gives him. He can always waive it, if he chooses. And the rule applies equally to a right conferred by the common law, by a statute, and by a written constitution.<sup>4</sup> Therefore,—

**§ 447. Bar of Statute of Limitations.**—If the right to sue upon a violated contract is barred by the statute of limitations, the delinquent may waive this defence.<sup>5</sup> One

<sup>1</sup> *Ante*, § 74-77; *Seymour v. Marlboro*, 40 Vt. 171; *Kenan v. Holloway*, 16 Ala. 53.

<sup>2</sup> *Beadle v. Whitlock*, 64 Barb. 287; *Jennings v. Brown*, 12 Law J. N. S. Ex. 86 (which compare with *Beaumont v. Reeve*, 8 Q. B. 483); *Allen v. Davison*, 16 Ind. 416; *Maurer v. Mitchell*, 9 Watts & S. 69; *Spaulding v. Crawford*, 27 Texas, 155; *Cook v. Bradley*, 7 Conn. 57; *Bailey v. Bussing*, 29 Conn. 1; *Merrick v. Bank of the Metropolis*, 8 Gill, 59; *Swift v. Crocker*, 21 Pick. 241; *Warner v. Booge*, 15 Johns. 233. In *Beaumont v. Reeve*, *supra*, Lord Denman, C. J., at p. 487, said: “An express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid;” adding: “This result we arrived at, after much deliberation, and we now adhere to it.” See *Runnemaker v. Cordray*, 54 Ill. 303.

<sup>3</sup> *Met. Con.* 193 et seq.

<sup>4</sup> 1 *Bishop Crim. Law*, § 995-1007; 1 *Bishop Crim. Proced. I.*, § 117-125; *post*, § 655 et seq.

<sup>5</sup> The reason of the doctrine is not always put in these terms; but the views in text accord, if not with the language of the modern decisions, with the decisions themselves. The old notion, that the lapse of the statutory period created a presumption of payment, consequently that payment would be en-

method of waiver is to neglect to plead the statute when sued.<sup>1</sup> But the common method, which is sufficient, is by an express promise to pay, or by such an acknowledgment of present indebtedness as implies a promise.<sup>2</sup> Again,—

**§ 448. Bankruptcy, etc.** — If a debt is discharged under bankruptcy or insolvency laws, the debtor, by a promise to pay it, waives the benefit of those laws, and payment may be compelled.<sup>3</sup> Once more,—

**§ 449. Endorser — Demand and Notice.** — An endorser of a note or bill, who is released from liability by the holder's neglecting demand and notice, may waive this advantage. And he does waive it if he promises payment with full knowledge of the facts.<sup>4</sup> But,—

**§ 450. Release by Party.** — If the party, claiming under a contract, or to whom a debt is due, voluntarily, for a suf-

forced whenever this presumption is rebutted by the evidence, is exploded. A late English writer, speaking of these and the other like cases, says: "The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection." Leake Con. 317. And he cites Earle *v.* Oliver, 2 Exch. 71, 89; Flight *v.* Reed, 1 H. & C. 703, 713, 716; note to Wennall *v.* Adney, 3 B. & P. 247, 249. Among American decisions, see Shepard *v.* Rhodes, 7 R. I. 470.

<sup>1</sup> 1 Saund. Wms. ed. 283, notes; 2 Ib. 63 *a*.

<sup>2</sup> Chasemore *v.* Turner, Law Rep. 10 Q. B. 500, 14 Eng. Rep. 304, and Moak's note at p. 326; Johns *v.* Lantz, 13 Smith, Pa. 324; Georgia Ins. Co. *v.* Ellicott, Taney, 130; Chambers *v.* Rubey, 47 Misso. 99; Simonton *v.* Clark, 65 N. C. 525; Harper *v.* Fairley, 53 N. Y. 442; Turner *v.* Smart, 6 B. & C. 603; Norton *v.* Colby, 52 Ill. 198. See Shapley *v.* Abbott, 42 N. Y. 443; Beardsley *v.* Hall, 36 Conn. 270.

<sup>3</sup> Penn *v.* Bennet, 4 Camp. 205; Trueman *v.* Fenton, Cowp. 544; Roberts *v.* Morgan, 2 Esp. 736; Lang *v.* Mackenzie, 4 Car. & P. 463; Williams *v.* Dyde, Peake, 68; Besford *v.* Saunders, 2 H. Bl. 116; Fleming *v.* Hayne, 1 Stark. 370; Lerow *v.* Wilmarth, 7 Allen, 463; Williams *v.* Bugbee, 6 Cush. 418; Fitzgerald *v.* Alexander, 19 Wend. 402; Kenyon *v.* Worsley, 2 R. L 341; Baltimore, etc., Railroad *v.* Clark, 19 Md. 509; Smith *v.* Richmond, 19 Cal. 476; Earnest *v.* Parke, 4 Rawle, 452; Scouton *v.* Eislord, 7 Johns. 36; Turner *v.* Chrisman, 20 Ohio, 332; Farmers, etc., *v.* Flint, 17 Vt. 508.

<sup>4</sup> Sigerson *v.* Mathews, 20 How. U. S. 496; Thornton *v.* Wynn, 12 Wheat. 183; Ladd *v.* Kenney, 2 N. H. 340; Arnold *v.* Dresser, 8 Allen, 435; Low *v.* Howard, 10 Cush. 159; First National Bank *v.* Crittenden, 2 Thomp. & C. 118.

ficient consideration, or under seal with no consideration in fact, releases his claim, the obligation thus released will not support a fresh promise of payment, nor is it in any way revived thereby. And —

§ 451. **Why the Distinction.** — The reason for the difference is, that this is not a case wherein the law has tendered to the party an advantage, which he may therefore waive; but, by the act of the parties, the contract or debt has ceased to exist. There is nothing to waive.<sup>1</sup>

§ 452. **Contrary Opinions.** — Contrary to this view, there are some cases,<sup>2</sup> not very recent, which put a release under seal, where no actual consideration for it passes, on the same ground as a discharge in bankruptcy; holding, as to both, that the new promise revives the debt, not as a waiver of a legal right, but on the now exploded doctrine of a —

§ 453. **Moral Obligation.** — It was once held, that, if one under what was termed by the courts a moral obligation to do a thing, promised to do it, this was a consideration rendering the promise valid in law.<sup>3</sup> Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land; and put, in the place of law, the varying ideas of morals, which the changing incumbents of the bench might from time to time entertain. It does not, therefore, now prevail in England,<sup>4</sup> nor probably to any wide extent in our States;<sup>5</sup> though

<sup>1</sup> *Valentine v. Foster*, 1 Met. 520; *Montgomery v. Lampton*, 3 Met. Ky. 519; *Warren v. Whitney*, 24 Maine, 561; *Sneivil v. Read*, 9 Watts, 396.

<sup>2</sup> *Willing v. Peters*, 12 S. & R. 177 (perhaps overruled by *Sneivil v. Read*, 9 Watts, 396); *Stafford v. Bacon*, 25 Wend. 384.

<sup>3</sup> *Lee v. Muggeridge*, 5 Taunt. 37; *Vance v. Wells*, 8 Ala. 399.

<sup>4</sup> *Eastwood v. Kenyon*, 11 A. & E. 438; *Beaumont v. Reeve*, 8 Q. B. 483, 487; *Jennings v. Brown*, 9 M. & W. 496; note to *Wennall v. Adney*, 3 B. & P. 247, 249.

<sup>5</sup> *Dodge v. Adams*, 19 Pick. 429; *Ehle v. Judson*, 24 Wend. 97; *Waters v. Bean*, 15 Ga. 358; *Updike v. Titus*, 2 Beasley, 151.

there are States in which it has been adhered to so recently that we could not say it is not there the law now.<sup>1</sup>

§ 454. *The Doctrine of this Chapter restated.*

In morals, one who creates an expectation in another, by a promise, is bound to make the expectation good.<sup>2</sup> And, if we look into the reason, this case does not, in a just view, differ essentially from a class of legal ones in which the courts hold that there is a consideration.<sup>3</sup> The promise was a gift, which indeed the promisor was not bound to make; but having made it, he has morally no more right to reclaim it than to take back any other delivered gift. If he does reclaim it, he inflicts a mental wrong, and often a pecuniary one also. The promisee may have so acted on the strength of the promise that the withdrawal of it will be his ruin. Still, as the law of the land cannot redress all wrongs, it is doubtless wise in requiring a pecuniary consideration for those promises which it will enforce. Whatever has a market value, however small, in dollars and cents, is an adequate consideration; but a thing without such value is not. Thus it is with contracts which are executory. But an executed contract may be good though it was without consideration.

<sup>1</sup> *Montgomery v. Lampton*, 3 Met. Ky. 519; *Musser v. Ferguson*, 5 Smith, Pa. 475. I forbear to cite the body of the American authorities on either side of this question, since they would occupy space to little purpose. Each practitioner must determine the question, for his own State, upon an examination which could be but little aided by anything further here.

<sup>2</sup> *Paley Moral Phil.* b. 3, pt. 1, c. 5.

<sup>3</sup> As, for example, *ante*, § 422, 423.

## CHAPTER XXV.

CONTRACTS ILLEGAL, IMMORAL, AND CONTRARY TO THE POLICY  
OF THE LAW AND TO PUBLIC POLICY.

- 2 455. Introduction.
- 456-472. General Doctrine.
- 473-496. Some Particular Contracts.
- 497. Doctrine of the Chapter restated.

§ 455. **How the Chapter divided.** — We shall consider,  
I. The General Doctrine ; II. Some particular Contracts.

I. *The General Doctrine.*

§ 456. **Indirect Means.** — The law will not permit the accomplishment, by indirect means, of a thing which it forbids the doing of directly.<sup>1</sup> Hence —

§ 457. **Overtake what the Law would establish.** — If parties agree to do, or promote the doing of, a thing which the law forbids, or which is indirectly subversive of what the law was ordained to establish, their contract will not be enforced by the courts ; as, —

§ 458. **Directly forbidden.** — Any act which is forbidden either by the common or the statutory law — whether it is *malum in se*, or merely *malum prohibitum* ;<sup>2</sup> indictable,<sup>3</sup> or only subject to a penalty or forfeiture ;<sup>4</sup> or however otherwise

<sup>1</sup> *Booth v. Bank of England*, 7 Cl. & F. 509, 540.

<sup>2</sup> *Cannan v. Bryce*, 3 B. & Ald. 179, 183, 184; *White v. Buss*, 3 Cush. 448, 450.

<sup>3</sup> *Poplett v. Stockdale, Ryan & Moody* N. P. 337; *Fores v. Johnes*, 4 Esp. 97; *Gale v. Leckie*, 2 Stark. 107.

<sup>4</sup> *Bartlett v. Vinor, Carth.* 251.

prohibited by a statute<sup>1</sup> or the common law<sup>2</sup>—cannot be the foundation of a valid contract ; nor can anything auxiliary to, or promotive of, such act.<sup>3</sup>

§ 459. **Immoral.**—Prominent among the interests which the law protects, are the public morals.<sup>4</sup> Therefore a contract to commit an immoral act, or do what will be prejudicial to the morals of the community,—*contra bonos mores*, as the phrase is,—is void.<sup>5</sup> But there are still other interests equally cherished by the law ; the consequence whereof is, that—

§ 460. **Against Public Policy.**—A contract invading any one of the other interests which the law cherishes, though the thing to be done or promoted is not indictable, and not prohibited by any statute, termed a contract against public policy (or sound policy), is likewise void.<sup>6</sup> Finally,—

<sup>1</sup> *Peck v. Burr*, 6 Selden, 294; *Hathaway v. Moran*, 44 Maine, 67; *Lord v. Chadbourne*, 42 Maine, 429; *Cook v. Phillips*, 56 N. Y. 310; *Gaslight, etc., Co. v. Turner*, 8 Scott, 609, 6 Bing. N. C. 324; *Yeates v. Williams*, 5 Pike, 684; *Bemis v. Becker*, 1 Kan. 226.

<sup>2</sup> *Carpenter v. Beer*, Comb. 246; *Cope v. Rowlands*, 2 M. & W. 149, 2 Gale, 231.

<sup>3</sup> *Stanley v. Nelson*, 28 Ala. 514; *Milton v. Haden*, 32 Ala. 30; *Madison Ins. Co. v. Forsyth*, 2 Ind. 483; *Siter v. Sheets*, 7 Ind. 132; *Ellsworth v. Mitchell*, 31 Maine, 247; *Hall v. Mullin*, 5 Har. & J. 190, 193; *Bayley v. Taber*, 5 Mass. 286; *Wheeler v. Russell*, 17 Mass. 258; *Farrar v. Barton*, 5 Mass. 395; *Roby v. West*, 4 N. H. 285; *Nourse v. Pope*, 18 Allen, 87; *Solomon v. Dreschler*, 4 Minn. 278; *Downing v. Ringer*, 7 Misso. 585; *Carleton v. Whitcher*, 5 N. H. 196; *Brackett v. Hoyt*, 9 Fost. N. H. 264; *Bell v. Quin*, 2 Sandf. 146; *Seidenbender v. Charles*, 4 S. & R. 159; *Mitchell v. Smith*, 1 Binn. 110, 118; *Maybin v. Coulon*, 4 Dall. 298; *Biddis v. James*, 6 Binn. 321; *Hale v. Henderson*, 4 Humph. 199; *Elkins v. Parkhurst*, 17 Vt. 105; *Spalding v. Preston*, 21 Vt. 9; *Territt v. Bartlett*, 21 Vt. 184; *Rutland Bank v. Parsons*, 21 Vt. 199; *Bancroft v. Dumas*, 21 Vt. 456; *Armstrong v. Toler*, 11 Wheat. 258.

<sup>4</sup> 1 *Bishop Crim. Law*, § 500.

<sup>5</sup> 2 *Kent Com.* 466; *Fores v. Johns*, 4 Esp. 97; *Jones v. Randall*, Cowp. 37, 39; *Forsythe v. The State*, 6 Ohio, 19, 21; *Dumont v. Dufore*, 27 Ind. 268; *Merrick v. Bank of the Metropolis*, 8 Gill, 59.

<sup>6</sup> 2 *Kent Com.* 466; *Met. Con.* 229; *Pollock Con.* 251; *Jones v. Randall*, Cowp. 37, 39; *Printing, etc., Co. v. Sampson*, Law Rep. 19 Eq. 462; *Martin v. Bartow Iron Works*, 35 Ga. 320, 329; *Guenther v. Dewien*, 11 Iowa, 138; *Reynolds v. Nichols*, 12 Iowa, 398; *Odineal v. Barry*, 24 Missis. 9.

**§ 461. Policy of the Law.**—The term “policy of the law” is sometimes employed in the same sense as public policy, and perhaps the distinction between the two is not well established. But what is here meant is, that the law, for its own good order, as well as for the good of the community, has established certain channels within which all rights of property must flow, and parties cannot by their contracts create new channels. For example,—

**§ 462. Conveyances to Husband and Wife.**—Under the common law, a husband and his wife cannot, by any form of contract, or by any other means, become tenants by entireties of personal property; neither, according to respectable opinions, though not by universal doctrine, can real estate be so conveyed to them as to render them either joint tenants or tenants in common of it, but when the attempt is made the law will declare them to be tenants by entireties.<sup>1</sup> Other illustrations are numerous.

**§ 463. Repeal of Statute.**—If a contract is void as contrary to a statute, the repeal of the statute does not make it good, but it remains void.<sup>2</sup> Neither will a subsequent promise render it valid, being without consideration;<sup>3</sup> nor will any new statute.<sup>4</sup>

**§ 464. New Statute.**—Where the agreement was good when made, but a subsequent enactment has rendered it illegal, things done under it before the enactment remain valid.<sup>5</sup>

**§ 465. Intent—Mistake of Fact and Law.**—The elementary principles of the criminal law apply to the contracts now under consideration. For, as in the criminal law one who intentionally does a forbidden thing is punishable though

<sup>1</sup> 1 Bishop Mar. Women, § 211, 616-619.

<sup>2</sup> Gilliland *v.* Phillips, 1 S. C. 152; Robinson *v.* Barrows, 48 Maine, 186; Banchor *v.* Mansel, 47 Maine, 58; Milne *v.* Huber, 3 McLean, 212.

<sup>3</sup> Dever *v.* Corcoran, 3 Allen, N. B., referred to in Robinson *v.* Barrows, *supra*, at p. 189.

<sup>4</sup> Mays *v.* Williams, 27 Ala. 267.

<sup>5</sup> Bennett *v.* Woolfolk, 15 Ga. 218; Bradford *v.* Jenkins, 41 Missis. 328. And see Tucker *v.* Stokes, 3 Sm. & M. 124; *post*, § 628.

not aware that the law forbids it;<sup>1</sup> so, to render a contract void as against public policy, it is not required that the parties should understand this to be its character and effect.<sup>2</sup> And as, in the criminal law, one who through an innocent mistake of facts does an apparently indictable act, escapes punishment;<sup>3</sup> so a man is not civilly to suffer by his contract being declared void as against law or public policy, if ignorant of the facts which make it void.<sup>4</sup> Consequently,—

**§ 466. Innocent Party.**—A father, who lets his minor son to service, may recover compensation, though, unknown to him, the son has been employed in selling liquor contrary to a statute which rendered the sales indictable.<sup>5</sup> And if an actor, who plays in a theatrical exhibition which is unlawful because not licensed, does not know that it is not licensed, he may recover for his services.<sup>6</sup> On this principle,—

**§ 467. Indemnity to Officer Serving Process.**—When an officer is called upon to arrest one or attach his goods, and there is doubt as to the identity of the person or the ownership of the goods, he may demand a bond of indemnity;<sup>7</sup> then, though the seizure proves to be unlawful, the bond is valid if the parties acted in good faith, not knowing the real facts; otherwise it is invalid.<sup>8</sup> And—

**§ 468. Indemnity to Private Person.**—An indemnity to a private person, who assists in taking property under a claim of right, is likewise valid, when the act is in good faith, though it turns out to be a trespass.<sup>9</sup>

<sup>1</sup> 1 Bishop Crim. Law, § 294, 300, 309.

<sup>2</sup> Saratoga County Bank *v.* King, 44 N. Y. 87, 92.

<sup>3</sup> 1 Bishop Crim. Law, § 301, 303.

<sup>4</sup> Quirk *v.* Thomas, 6 Mich. 67.

<sup>5</sup> Emery *v.* Kempton, 2 Gray, 257.

<sup>6</sup> Roys *v.* Johnson, 7 Gray, 162. See ante, § 141.

<sup>7</sup> Drake *Attach.* § 189.

<sup>8</sup> Marsh *v.* Gold, 2 Pick. 285; Anderson *v.* Farns, 7 Blackf. 343; Lampton *v.* Taylor, 5 Litt. 273; Davis *v.* Tibbats, 7 J. J. Mar. 264; Stark *v.* Raney, 18 Cal. 622; McCartney *v.* Shepard, 21 Misso. 573; Ives *v.* Jones, 3 Ire. 538.

<sup>9</sup> Avery *v.* Halsey, 14 Pick. 174; Stone *v.* Hooker, 9 Cow. 154. And see McLaren *v.* Graham, 26 Missis. 400.

§ 469. **Indemnity for Neglect of Duty.**—An undertaking to indemnify an officer for neglecting his duty is, within the principle under consideration, void.<sup>1</sup> But,—

§ 470. **Taking Security.**—It is not a neglect in him, when making an attachment, to take security for the debt; so that a note given him on consideration of his releasing or forbearing an attachment is good.<sup>2</sup>

§ 471. **In Part illegal.**—A contract illegal in part and legal as to the residue, is void as to all, when the two parts cannot be separated; when they can be, the good will stand and the rest fall. One entire consideration cannot, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal.<sup>3</sup>

§ 472. **General and Particular Views.**—Some of the particular views, to be presented under our next sub-title, might be so generalized as to find a place here. And while the foregoing doctrines are general, they have also their particular applications; also, while the following propositions are particular, they are likewise of general applicability.

<sup>1</sup> *Hodson v. Wilkins*, 7 Greenl. 113; *Ayer v. Hutchins*, 4 Mass. 370; *Churchill v. Perkins*, 5 Mass. 541.

<sup>2</sup> *Foster v. Clark*, 19 Pick. 329; *Shotwell v. Hamblin*, 28 Missis. 156; *Randle v. Harris*, 6 Yerg. 509. See *Webber v. Blunt*, 19 Wend. 188; *Winter v. Kinney*, 1 Comst. 365; *Hunter v. Agee*, 5 Humph. 57; *Prewitt v. Garrett*, 6 Ala. 128.

<sup>3</sup> *Yale v. Rex*, 6 Bro. P. C. 27, 81; *Kimbrough v. Lane*, 11 Bush, 556; *Saratoga County Bank v. King*, 44 N. Y. 87; *Chandler v. Johnson*, 39 Ga. 85; *Braitch v. Guelich*, 37 Iowa, 212; *Bixby v. Moor*, 51 N. H. 402; *Fackler v. Ford*, McCahon, 21; *Hanauer v. Gray*, 25 Ark. 350; *Widoe v. Webb*, 20 Ohio State, 431; *Jones's Case*, 1 Leon. 208; *Mason v. Watkins*, 2 Vent. 109; *Valentine v. Stewart*, 15 Cal. 387; *Dean v. Emerson*, 102 Mass. 480; *More v. Bonnet*, 40 Cal. 251; *Newbury Bank v. Stegall*, 41 Missis. 142. Where a promissory note is given in part payment of a running account, consisting of items some of which are legal and others illegal, it has been held that, if the legal items do not exceed the amount of the note, it is good; because the payee could not have applied it on the illegal ones. *Warren v. Chapman*, 105 Mass. 87. A running account, therefore, before it is made the consideration for a new promise, is separable; not afterward. And *Bixby v. Moore*, *supra*, holds, that one cannot recover anything on a *quantum meruit* for an entire service, where a small part of his labor consisted in selling liquor contrary to law.

Divisions, made by an author, are for practical convenience only; the law itself is seamless.<sup>1</sup>

## II. *Some Particular Contracts.*

**§ 473. Compounding.**—Any agreement to compound an offence or a penal action, of a sort to be indictable,<sup>2</sup> is, therefore, void as against law.<sup>3</sup> But—

**§ 474. Amends.**—This doctrine does not render void a promise or security given as mere amends for the civil wrong<sup>4</sup> involved in the criminal transaction.<sup>5</sup>

**§ 475. Obstructing Judicial Justice.**—So, though a contract does not amount to compounding an offence, if it tends in any way to obstruct judicial proceedings, and especially criminal justice, it is void;<sup>6</sup> as, improperly to stifle a criminal prosecution,<sup>7</sup> to abstain from testifying as a witness in a suit,<sup>8</sup> to procure a witness to swear to a particular thing,<sup>9</sup> or to pay a witness more if the party succeeds than if he does not.<sup>10</sup>

<sup>1</sup> And see *Jones v. Randall*, Cowp. 37, 39.

<sup>2</sup> 1 Bishop Crim. Law, § 709 et seq.

<sup>3</sup> *Ante*, § 458; *Osbaldeston v. Simpson*, 7 Jur. 734; *Williams v. Bayley*, Law Rep. 1 H. L. 200; *Soule v. Bonney*, 37 Maine, 128; *Commonwealth v. Pease*, 16 Mass. 91; *Bell v. Wood*, 1 Bay, 249; *Mattocks v. Owen*, 5 Vt. 42; *Plumer v. Smith*, 5 N. H. 553; *Cameron v. McFarland*, 2 Law Repos. 415; *Corley v. Williams*, 1 Bailey, 588; *Hinesburgh v. Sumner*, 9 Vt. 23; *State Bank v. Moore*, 2 Southard, 470; *Bailey v. Buck*, 11 Vt. 252; *Kimbrough v. Lane*, 11 Bush. 556.

<sup>4</sup> *Catlin v. Henton*, 9 Wis. 476; *Mathison v. Hanks*, 2 Hill, S. C. 625; *Puckett v. Roquemore*, 55 Ga. 235.

<sup>5</sup> 1 Bishop Crim. Law, § 264-278.

<sup>6</sup> See, for illustrations, *Dixon v. Olmstead*, 9 Vt. 310; *Douville v. Merrick*, 25 Wis. 688; *Stoutenburg v. Lybrand*, 13 Ohio State, 228; *Porter v. Jones*, 52 Misso. 399; *Price v. Caperton*, 1 Duvall, 207.

<sup>7</sup> *Shaw v. Reed*, 30 Maine, 105; *Ward v. Allen*, 2 Met. 53; *Baker v. Farris*, 61 Misso. 389; *Barclay v. Breckinridge*, 4 Met. Ky. 874; *Snyder v. Willey*, 33 Mich. 483; *Southern Express Co. v. Duffey*, 48 Ga. 358; *Soule v. Bonney*, 37 Maine, 128; *Keir v. Leeman*, 6 Q. B. 308.

<sup>8</sup> *Valentine v. Stewart*, 15 Cal. 387; *Badger v. Williams*, 1 D. Chip. 137.

<sup>9</sup> *Patterson v. Donner*, 48 Cal. 369.

<sup>10</sup> *Dawkins v. Gill*, 10 Ala. 206.

§ 476. **Settling Private Suit—Bastardy.**—It is always commendable to compromise a private suit; and, within this principle, an agreement not to prosecute under the bastardy act is a good consideration for a promise.<sup>1</sup>

§ 477. **Champertous Contracts**—are void at the common law. The old doctrines on this subject have been greatly modified in later times, and the present rulings differ in our States. In some States, this impediment to the enforcing of a contract has almost ceased to exist; in others, it remains in something near its original vigor.<sup>2</sup>

§ 478. **Restraint of Trade.**—An agreement not to carry on a particular trade, which is lawful, and beneficial to the community and to the individual, is void as against public policy.<sup>3</sup> But neither public nor private interests are prejudiced where persons in an employment divide, one conducting it in one place and another in another. Therefore, if, on good reason, and for a valuable consideration,<sup>4</sup> a man promises not to carry on a specified business within a defined locality of reasonable extent, either generally, or especially where the restriction is also to a limited number of years,—and perhaps, in some very exceptional cases, under unusual

<sup>1</sup> Burgen *v.* Straughan, 7 J. J. Mar. 583; Hays *v.* McFarlan, 32 Ga. 699; Weaver *v.* Waterman, 18 La. An. 241; Howe *v.* Litchfield, 3 Allen, 443; Rice *v.* Maxwell, 13 Sm. & M. 289; Stephens *v.* Spiers, 25 Misso. 386; Sharp *v.* Teese, 4 Halst. 352; Payne *v.* Eden, 3 Caines, 213; Maxwell *v.* Campbell, 8 Ohio State, 265; Knight *v.* Priest, 2 Vt. 507; Robinson *v.* Crenshaw, 2 Stew. & P. 276.

<sup>2</sup> 2 Bishop Crim. Law, § 121-140; Evans *v.* Bell, 6 Dana, 479; McMahan *v.* Bowe, 114 Mass. 140; Martin *v.* Clarke, 8 R. I. 389; Brown *v.* Beauchamp, 5 T. B. Monr. 413; Arden *v.* Patterson, 5 Johns. Ch. 44; McMicken *v.* Perin, 18 How. U. S. 507; Byrd *v.* Odem, 9 Ala. 755; Scobey *v.* Ross, 13 Ind. 117; Coquillard *v.* Bearss, 21 Ind. 479; Slade *v.* Rhodes, 2 Dev. & Bat. Eq. 24; Weedon *v.* Wallace, Meigs, 286; Burt *v.* Place, 6 Cow. 431; Nichols *v.* Bunting, 3 Hawks, 86; Martin *v.* Amos, 13 Ire. 201.

<sup>3</sup> Alger *v.* Thacher, 19 Pick. 51; Hilton *v.* Eckersley, 6 Ellis & B. 47, 66; Mitchel *v.* Reynolds, 1 P. Wms. 181; Homer *v.* Ashford, 3 Bing. 328; Dean *v.* Emerson, 102 Mass. 480; Ross *v.* Sadgbeer, 21 Wend. 166; Heicewh *v.* Hamilton, 3 Greene, Iowa, 596.

<sup>4</sup> Ante, § 28; Met. Con. 233.

circumstances, where the restriction is for a short time with no bound of space, — the undertaking is binding upon him.<sup>1</sup> And one may lawfully agree, that, during a given time, he will manufacture for the person with whom he is contracting, and no other.<sup>2</sup>

**§ 479. Meaning of “Reasonable Space.”** — What is a reasonable space, within the foregoing doctrine, cannot perhaps be defined; except that it may be large enough to render the contract effectual for its lawful purpose, yet not palpably larger. Always the full extent of the State will be too great.<sup>3</sup> And what is reasonable will depend much on the nature of the territory, its demands, and the sort of business.<sup>4</sup> A physician may restrict himself from a particular town and its vicinity.<sup>5</sup> And the like principle applies to other callings.<sup>6</sup>

<sup>1</sup> *Perkins v. Clay*, 54 N. H. 518; *Saratoga County Bank v. King*, 44 N. Y. 87, 91; *Guerand v. Dandelet*, 32 Md. 561; *Jenkins v. Temples*, 39 Ga. 655; *Treat v. Shoninger Melodeon Co.*, 35 Conn. 543; *Hatcher v. Andrews*, 5 Bush. 561; *Jones v. Heavens*, 4 Ch. D. 638; *Leather Cloth Co. v. Lorsont*, Law Rep. 9 Eq. 345; *McAlister v. Howell*, 42 Ind. 15; *Grasselli v. Lowden*, 11 Ohio State, 349; *Holmes v. Martin*, 10 Ga. 503; *Chappel v. Brockway*, 21 Wend. 157; *Kellogg v. Larkin*, 3 Chand. 133; *Beard v. Dennis*, 6 Ind. 200; *Pierce v. Woodward*, 6 Pick. 206.

<sup>2</sup> *Schwalm v. Holmes*, 49 Cal. 665.

<sup>3</sup> *More v. Bonnet*, 40 Cal. 251; *Dean v. Emerson*, *supra*; *Nobles v. Bates*, 7 Cow. 307; *Taylor v. Blanchard*, 18 Allen, 370.

<sup>4</sup> *Duffy v. Shockey*, 11 Ind. 70; *Whitney v. Slayton*, 40 Maine, 224; *Gilman v. Dwight*, 18 Gray, 356; *Hitchcock v. Coker*, 6 A. & E. 438, 454.

<sup>5</sup> *Warfield v. Booth*, 33 Md. 63; *McClurg's Appeal*, 8 Smith, Pa. 51; *Butler v. Burleson*, 16 Vt. 176; *Davis v. Mason*, 5 T. R. 118.

<sup>6</sup> *Grundy v. Edwards*, 7 J. J. Mar. 368; *Archer v. Marsh*, 6 A. & E. 959; *California Steam Nav. Co. v. Wright*, 6 Cal. 258; *Dunlop v. Gregory*, 6 Seld. 241; *Bowser v. Bliss*, 7 Blackf. 344; *Clark v. Crosby*, 37 Vt. 188; *Laubenheimer v. Mann*, 17 Wis. 542; *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 522; *Allsopp v. Wheatcroft*, Law Rep. 15 Eq. 59; *Horner v. Graves*, 7 Bing. 735; *Grasselli v. Lowden*, 11 Ohio State, 349, 357; *Bunn v. Guy*, 4 East, 190. A patent being a monopoly, perhaps the general doctrines are qualified when applied to the sale of patented articles. And see *Kinsman v. Parkhurst*, 18 How. U. S. 289; *Billings v. Ames*, 32 Misso. 265; *Costar v. Brush*, 25 Wend. 628; *Morse Twist Drill, etc., Co. v. Morse*, 103 Mass. 73.

**§ 480. Conspiring to defraud Third Person.**—If two persons agree to defraud a third, whether at an auction or elsewhere, such executory agreement is void as being unlawful.<sup>1</sup> Beyond this,—

**§ 481. Auction Sales.**—Sales by auction are a means of converting lands and chattels into money under urgent circumstances, of settling estates of deceased persons, and the like; so that the public interests require them to be conducted with freedom and fairness. Therefore agreements distinctly repugnant to these interests are void as against public policy. The decisions are perhaps not minutely in accord as to what cases are within this principle; but, if two persons, really competing for an article, agree that one shall abstain from bidding and the profits shall be divided, this is void.<sup>2</sup> And so are all agreements, in whatever form, to stifle fair competition.<sup>3</sup> On the other hand, partners, or persons contemplating a partnership as to the particular thing; several, who each want a part, and not the whole, of the thing, and are to divide it between themselves; and others, whose object is not an undue advantage but a fair purchase, may enter into a valid arrangement for one to bid and the rest abstain.<sup>4</sup>

<sup>1</sup> *Sternburg v. Bowman*, 108 Mass. 325; *Harwood v. Knapper*, 50 Misso. 456; *Heineman v. Newman*, 55 Ga. 262; *Powell v. Inman*, 8 Jones, N. C. 436; *Bliss v. Matteson*, 45 N. Y. 22; *Davison v. Seymour*, 1 Bosw. 88; *Jackson v. Duchaire*, 3 T. R. 551; *McKewan v. Sanderson*, Law Rep. 15 Eq. 229, 234; *Hamilton v. Scull*, 25 Misso. 165; *Fenton v. Ham*, 35 Misso. 409.

<sup>2</sup> *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *National Bank of Metropolis v. Sprague*, 5 C. E. Green, 159; *Jenkins v. Frink*, 30 Cal. 586; *Loyd v. Malone*, 28 Ill. 43; *Wooton v. Hinkle*, 20 Misso. 290; *Sharp v. Wright*, 35 Barb. 236. On this point the English doctrine appears to be the other way. *Galton v. Emuss*, 1 Collier, 248.

<sup>3</sup> *Gardiner v. Morse*, 25 Maine, 140; *James v. Fulcrud*, 5 Texas, 512; *Hunt v. Frost*, 4 Cush. 54; *Hook v. Turner*, 22 Misso. 333; *Jones v. Caswell*, 3 Johns. Cas. 29; *Thompson v. Davies*, 18 Johns. 112; *Ingram v. Ingram*, 4 Jones, N. C. 188; *Martin v. Ranlett*, 5 Rich. 541; *Brisbane v. Adams*, 3 Comst. 129; *Atcheson v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592.

<sup>4</sup> *Breslin v. Brown*, 24 Ohio State, 565; *National Bank of Metropolis v.*

§ 482. **Liquor Laws.**—If a statute prohibits the sale of intoxicating liquors except under specified circumstances, an executory contract of sale contrary to its provisions, or a promise to pay the purchase money, is, therefore, void.<sup>1</sup>

§ 483. **Lord's Day.**—Statutes making punishable or penal the violation of the Lord's Day, or Christian Sabbath, prevail in all our States. And wherever an act of contracting is within their penalties, the executory contract is void.<sup>2</sup> But where the act is not within their penalties,—as, for example, a sale of goods by one whose “ordinary calling” is not the selling of goods,—the contract is valid;<sup>3</sup> that is, the making of a contract on Sunday does not violate the common law,<sup>4</sup> consequently it must violate the statute to be invalid.

§ 484. **Ratification of Sunday Contract — New Contract.**—The contract is sometimes spoken of by the courts as susceptible of “ratification” on a subsequent week-day.<sup>5</sup> But the better form of expression is, that, as it is void and not voidable, there can be no technical ratification of it; yet

Sprague, *supra*; Jenkins *v.* Frink, *supra*; Smull *v.* Jones, 6 Watts & S. 122; McMinn *v.* Phipps, 3 Sneed, Tenn. 196; James *v.* Fulcrud, *supra*; Bellows *v.* Russell, 20 N. H. 427; Kearney *v.* Taylor, 15 How. U. S. 494; Smith *v.* Greenlee, 2 Dev. 136; Switzer *v.* Skiles, 3 Gilman, 529; Goode *v.* Hawkins, 2 Dev. Eq. 393.

<sup>1</sup> *Ante*, § 458; Creekmore *v.* Chitwood, 7 Bush, 317; Hubbell *v.* Flint, 13 Gray, 277. And see, for a minute statement, with a large collection of authorities, *Bishop Stat. Crimes*, § 1030, 1031.

<sup>2</sup> *Chestnut v. Harbaugh*, 28 Smith, Pa. 473; *Pike v. King*, 16 Iowa, 49; *Sayre v. Wheeler*, 31 Iowa, 112; *Tucker v. West*, 29 Ark. 386; *Clough v. Goggins*, 40 Iowa, 325; *Sayre v. Wheeler*, 32 Iowa, 559; *Hussey v. Roquemore*, 27 Ala. 281; *Hill v. Sherwood*, 3 Wis. 343; *Love v. Wells*, 25 Ind. 503; *Pattee v. Greely*, 13 Met. 284; *Merriam v. Stearns*, 10 Cush. 257; *Sellers v. Dugan*, 18 Ohio, 489.

<sup>3</sup> *Drury v. Defontaine*, 1 Taunt. 131; *Merritt v. Earle*, 31 Barb. 38; *Sanders v. Johnson*, 29 Ga. 526; *Kaufman v. Hamm*, 30 Misso, 387; *Allen v. Gardiner*, 7 R. I. 22; *Moore v. Murdoch*, 26 Cal. 514.

<sup>4</sup> *Bloom v. Richards*, 2 Ohio State, 387; *Batsford v. Every*, 44 Barb. 618.

<sup>5</sup> *Tucker v. West*, 29 Ark. 386; *Harrison v. Colton*, 31 Iowa, 16; *Smith v. Case*, 2 Oregon, 190; *Perkins v. Jones*, 26 Ind. 499; *Banks v. Werts*, 13 Ind. 203.

a new contract, express or implied, may be made on the same subject, as though nothing had been done on Sunday.<sup>1</sup> So, if there is a void promise by one on Sunday to pay to another a specific indebtedness, the other may recover on the original consideration.<sup>2</sup>

§ 485. **Date.**—The dating of a contract on a week-day, when it is really executed on Sunday, does not make it good.<sup>3</sup> Nor, if entered into on a week-day, is it ill because dated or to be performed on Sunday,<sup>4</sup> unless something unlawful is then to be done.<sup>5</sup>

§ 486. **Delivery.**—As the delivery of a legal instrument gives it efficacy, it may be good though written and signed on Sunday, if delivered on another day.<sup>6</sup>

§ 487. **Executed.**—When a Sunday contract has been executed,—that is, performed,—money paid and goods delivered under it cannot be recovered back.<sup>7</sup> And money paid on Sunday in discharge of a debt, and retained afterward, is effectual for the purpose.<sup>8</sup>

<sup>1</sup> *Day v. McAllister*, 15 Gray, 433; *Ladd v. Rogers*, 11 Allen, 209; *Bradley v. Rea*, 14 Allen, 20; *Tucker v. West*, *supra*; *Meriwether v. Smith*, 44 Ga. 541; *Ryno v. Darby*, 5 C. E. Green, 281; *Finn v. Donahue*, 35 Conn. 216; *Pate v. Wright*, 30 Ind. 476; *Bradley v. Rea*, 103 Mass. 188; *Butler v. Lee*, 11 Ala. 885; *Rainey v. Capps*, 22 Ala. 288; *Pope v. Linn*, 50 Maine, 83; *Reeves v. Butcher*, 2 Vroom, 224; *Kountz v. Price*, 40 Missis. 341.

<sup>2</sup> *Sayre v. Wheeler*, 31 Iowa, 112. See *Miller v. Lynch*, 38 Missis. 344.

<sup>3</sup> *Heller v. Crawford*, 37 Ind. 279.

<sup>4</sup> *Stacy v. Kemp*, 97 Mass. 166; *Aldridge v. Decatur Branch Bank*, 17 Ala. 45.

<sup>5</sup> *Smith v. Wilcox*, 24 N. Y. 353.

<sup>6</sup> *Prather v. Harlan*, 6 Bush, 185; *Dohoney v. Dohoney*, 7 Bush, 217; *Sherman v. Roberts*, 1 Grant, Pa. 261; *Goss v. Whitney*, 24 Vt. 187; *Hilton v. Houghton*, 35 Maine, 143. See *McCalop v. Hereford*, 4 La. An. 185; *Bryant v. Booze*, 55 Ga. 438; *Tuckerman v. Hinkley*, 9 Allen, 452; *Dickinson v. Richmond*, 97 Mass. 45; *Stackpole v. Symonds*, 3 Fost. N. H. 229; *Clough v. Davis*, 9 N. H. 500.

<sup>7</sup> *Chesnut v. Harbaugh*, 28 Smith, Pa. 473; *Finn v. Donahue*, 35 Conn. 216; *Uhler v. Applegate*, 2 Casey, Pa. 140; *Greene v. Godfrey*, 44 Maine, 25; *Shuman v. Shuman*, 3 Casey, Pa. 90. But see *Tucker v. Mowrey*, 12 Mich. 378; *Smith v. Bean*, 15 N. H. 577; *Sumner v. Jones*, 24 Vt. 317.

<sup>8</sup> *Johnson v. Willis*, 7 Gray, 164.

**§ 488. Violation of Lord's Day as Consideration.** — If the consideration of an executory contract is something unlawfully done on the Lord's Day, it cannot be enforced.<sup>1</sup>

**§ 489. Wagers.** — A wager has no legitimate connection with any affair of life. It is merely a plan by which one man gains and another loses money or its value, without any real consideration, or any benefit to the individual or the community. On a just view of things, a judge would better serve the state, and more adorn his office, to go round with blacking and brush "shining" the boots of the officers of his court, than to sit on the bench enforcing a wager.<sup>2</sup> Still it is held in England, that, at common law, a wager is recoverable by suit when not illegal, injurious to third persons, of a tendency to disturb the peace, or "against morality or *sound policy*;" admitting that the "policy" of wagers may sometimes be "sound."<sup>3</sup> In our own country, some courts have followed this English doctrine, while others have held that no wagers are recoverable.<sup>4</sup> However the common law may be, by statutes in England and our States nearly or quite all wagers and wagering contracts have become unlawful.

**§ 490. Gaming** — is closely connected with wagers, which commonly form of it a part. As a crime, it rests on old statutes, together with modern ones; it is not indictable under the earlier common law.<sup>5</sup> There are statutes against it in all our States; and they more or less modify the invalid civil contract and the remedy. But, for exact doctrines,

<sup>1</sup> *Slade v. Arnold*, 14 B. Monr. 287.

<sup>2</sup> And see post, § 611.

<sup>3</sup> *Good v. Elliott*, 3 T. R. 698; *Da Costa v. Jones*, Cowp. 729; *Ramloll Thackoorseydass v. Soojumnull Dhonmuil*, 6 Moore, P. C. 300, 310.

<sup>4</sup> Met. Con. 289. And see *Wilkinson v. Tousley*, 16 Minn. 299; *Hill v. Kidd*, 43 Gal. 615; *Merchants' Savings, etc., Co. v. Goodrich*, 75 Ill. 554; *Bishop Stat. Crimes*, § 85, note, 848, 870, 871, etc.

<sup>5</sup> *Bishop Stat. Crimes*, § 846, in which work, at the proper places, may be found a full discussion of the subject.

the practitioner should consult the statutes and decisions of his own State.

§ 491. **Choosing Governmental Officers.**—Obviously, a contract to promote an election fraud, of the indictable kind, is void as against law. But the rule of public policy extends further, and renders void every contract in any way calculated to obstruct the free and unbiased selection of the best men for positions of public trust: as, where a candidate for office, in consideration of money to help his election, promises that the person furnishing it shall share in the profits of the office;<sup>1</sup> or, where money is promised a mail contractor on consideration that he will repudiate his contract for carrying the mail, even though he has given bonds which will secure the government against loss;<sup>2</sup> or, where a candidate for office promises to pay for food and liquor furnished to his “friends.”<sup>3</sup>

§ 492. **Influencing Official Conduct.**—A contract to pay a person—as, for example, a lawyer—openly to present facts and make appeals to an officer in the regular course of his official business—as, to appear before a court, or at an appointed hearing before a legislative committee—is legitimate and enforceable.<sup>4</sup> But all private efforts to influence public

<sup>1</sup> *Martin v. Wade*, 37 Cal. 168. And see, of the like sort, *O'Rear v. Kiger*, 10 Leigh, 622; *Gray v. Hook*, 4 Comst. 449. See also *Eddy v. Capron*, 4 R. I. 394; *Haas v. Fenlon*, 8 Kan. 601; *Stroud v. Smith*, 4 Houston, 448; *Ferris v. Adams*, 23 Vt. 136.

<sup>2</sup> *Weld v. Lancaster*, 56 Maine, 453. See *Gulick v. Ward*, 5 Halst. 87.

<sup>3</sup> *Duke v. Asbee*, 11 Ire. 112.

<sup>4</sup> *Wimpenny v. French*, 18 Ohio State, 469; *Price v. Caperton*, 1 Duval, 207; *Wilsey v. Collier*, 7 Md. 273; *Sedgwick v. Stanton*, 4 Kernan, 289; *Bryan v. Reynolds*, 5 Wis. 200. **Pardon.**—I cannot see that every effort to procure a pardon should be deemed contrary to public policy, rendering a promise to pay for it void; but, favoring such efforts, there are some Georgia cases, which, to their full extent, it is difficult to approve. *Formby v. Pryor*, 15 Ga. 258; *Meadow v. Bird*, 22 Ga. 246; *Bird v. Meadows*, 25 Ga. 251. On the other hand, in the Pennsylvania case of *Bowman v. Coffroth*, 9 Smith, Pa. 19, 23, Read, J., said: “The cases cited by the defendant in his paper book, to which may be added *Marshall v. Baltimore*, etc., Railroad, 16 How. U. S. 314,

officers, however honest and fair in themselves, being contrary to what ought to be the known and established course in every office,—and all attempts, however open, by addressing to the officer other than public considerations,—are detrimental to the public interests ; therefore contracts founded upon them are void. Examples of these are lobbying<sup>1</sup> and other contracts to employ private influence with a public officer.<sup>2</sup> And,—

**§ 493. Contracts with the Officer.**—On the like reason, a contract between an officer and another person, by which the former undertakes to do anything of official duty, right or wrong, in accord with such duty or contrary to it, is void.<sup>3</sup> This does not, as we have seen,<sup>4</sup> prevent a ministerial officer, in proper circumstances, demanding and receiving a bond of indemnity. Nor does it prevent the officer's taking compensation for services not within the requirements of his office,<sup>5</sup> or the legal compensation for official acts.

**§ 494. Unlawful Cohabitation.**—All illicit commerce

establish, that a contract to procure a pardon from the governor, of a convict, would now be held illegal, whether improper means were used or not. So, to procure the passage of a private statute, or to procure an appointment to office by private influence, or to purchase the right of administration, are all held to be illegal and void.” And see *Kribben v. Haycraft*, 26 Miss. 396; *Hatzfield v. Gulden*, 7 Watts, 152; *Chadwick v. Knox*, 11 Fost. N. H. 226.

<sup>1</sup> *Mills v. Mills*, 40 N. Y. 543; *Trist v. Child*, 21 Wal. 441; *Frost v. Belmont*, 6 Allen, 152; *Marshall v. Baltimore, etc., Railroad*, 16 How. U. S. 314; *Gil v. Williams*, 12 La. An. 219; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Powers v. Skinner*, 34 Vt. 274; *Usher v. McBratney*, 3 Dillon, 385.

<sup>2</sup> *Maguire v. Smock*, 1 Wils. Ind. 92; *Hutchen v. Gibson*, 1 Bush, 270; *Cook v. Shipman*, 51 Ill. 316. And see *Devlin v. Brady*, 36 N. Y. 531; *Dudley v. Butler*, 10 N. H. 281; *Smith v. Appelgate*, 3 Zab. 352; *Wimpenny v. French*, 18 Ohio State, 469.

<sup>3</sup> *Satterlee v. Jones*, 3 Duer, 102; *Odineal v. Barry*, 24 Missis. 9; *Callagan v. Hallett*, 1 Caines, 104; *Randolph v. Jones, Breese*, 108; *Richardson v. Cran-dall*, 48 N. Y. 348; *Newsom v. Thighen*, 30 Missis. 414.

<sup>4</sup> *Ante*, § 467.

<sup>5</sup> See 2 Bishop Crim. Law, § 395; *Converse v. United States*, 21 How. U. S. 468, 469; *Morrell v. Quarles*, 35 Ala. 544; *Evans v. Trenton*, 4 Zab. 764; *Bona v. Davant, Rilev Eq. 44*; *Massing v. The State*, 14 Wis. 502.

between the sexes being immoral, a promise to pay for it, made before it takes place, is void even where the act is not indictable,<sup>1</sup> and even though the promise is the virtuous one of marriage.<sup>2</sup> Nor does a seal help the promise; because, though it implies a consideration, the true consideration vitiates what else would be adequate.<sup>3</sup> After the intercourse has been had, a promise to pay for it is void, not because it is immoral to repair a wrong, but because the consideration is past;<sup>4</sup> and, in a case like this, the law cannot imply a prior request.<sup>5</sup> But a sealed undertaking in reparation of the wrong will be good; for this is not immoral.<sup>6</sup> And,—

§ 495. **Reparation.**—In various circumstances, after a cohabitation has taken place, some collateral matter may be brought in for a consideration, to enable one to make a valid promise not under seal, the leading motive to which is reparation for the wrong.<sup>7</sup> If the case is within the bastardy acts, a forbearance to prosecute under them will be a good consideration.<sup>8</sup> And a promise to a husband, in

<sup>1</sup> *Walker v. Gregory*, 36 Ala. 180; *Winebrinner v. Weisigir*, 3 T. B. Monr. 35; *Sherman v. Barrett*, 1 McMullen, 147; *Singleton v. Bremar, Harper*, 201; *Trovinger v. McBurney*, 5 Cow. 253.

<sup>2</sup> *Baldy v. Stratton*, 11 Barr, 316; *Goodall v. Thurman*, 1 Head, 209.

<sup>3</sup> *Ante*, § 23, 65; *Walker v. Perkins*, 3 Bur. 1568; *Friend v. Harrison*, 2 Car. & P. 584.

<sup>4</sup> *Beaumont v. Reeve*, 8 Q. B. 483.

<sup>5</sup> *Ante*, § 448-445.

<sup>6</sup> *Gray v. Mathias*, 5 Ves. 286; *Met. Con.* 222. See *Cusack v. White*, 2 Mill, 279; *Shenk v. Mingle*, 13 S. & R. 29. And, for the law on several of the propositions in the text, *Ayerst v. Jenkins*, *Law Rep.* 16 Eq. 275.

<sup>7</sup> *Self v. Clark*, 2 Jones Eq. 309; *Flanegan v. Garrison*, 28 Ga. 136; *Trovinger v. McBurney*, 5 Cow. 253.

<sup>8</sup> *Ante*, § 474; *Burgen v. Straughan*, 7 J. J. Mar. 583; *Hays v. McFarlan*, 32 Ga. 699; *Weaver v. Waterman*, 18 La. An. 241; *Howe v. Litchfield*, 3 Allen, 443; *Rice v. Maxwell*, 18 Sm. & M. 289; *Stephens v. Spiers*, 25 Misso. 386; *Sharp v. Teese*, 4 Halst. 352; *Maxwell v. Campbell*, 8 Ohio State, 265; *Knight v. Priest*, 2 Vt. 507; *Payne v. Eden*, 3 Caines, 313; *Robinson v. Crenshaw*, 2 Stew. & P. 276; *Ashburne v. Gibson*, 9 Port. 549; *Coleman v. Frum*, 3 Scam. 378; *Abshire v. Mather*, 27 Ind. 381; *Thompson v. Nelson*, 28 Ind. 431; *Clarke v. McFarland*, 6 Dana, 45.

settlement of a claim for the seduction of his wife, will be valid.<sup>1</sup>

§ 496. **Prostitution — Bawdy-house.** — Any contract encouraging prostitution, or auxiliary to the keeping of a bawdy-house, — or, in the language of Pollock, C. B., “supplying a thing with the knowledge that it is going to be used for that purpose,” — is void.<sup>2</sup> This includes the letting of a house for bawdry,<sup>3</sup> letting a carriage to a prostitute as a part of her equipage to entice men,<sup>4</sup> and in some circumstances furnishing her with board<sup>5</sup> and clothing.<sup>6</sup> But, in the application of the doctrine, there are some nice distinctions; and not on all of them are the courts quite agreed.<sup>7</sup>

§ 497. *The Doctrine of this Chapter restated.*

The law, like all other sciences and arts, has, for convenience, for adaptation to our infirmities, and to some extent from necessity, technical rules, and something beyond, which may be termed a technical policy. It cannot, therefore, enforce a contract violating any of these; in other words, the contract is void. *A fortiori*, therefore, it cannot recognize any validity in an agreement to do what the legal rule directly forbids, or an agreement the act of making which was a violation of the law. All promises,

<sup>1</sup> See *McGowen v. Bush*, 17 Texas, 195.

<sup>2</sup> *Pearce v. Brooks*, Law Rep. 1 Ex. 213, 217; *Smith v. White*, Law Rep. 1 Eq. 626.

<sup>3</sup> *Crisp v. Churchill*, cited 1 B. & P. 340; *Jennings v. Throgmorton*, Ryan & Moody N. P. 251. See 1 Bishop Crim. Law, § 1090-1096.

<sup>4</sup> *Pearce v. Brooks*, *supra*; *Girardy v. Richardson*, 1 Esp. 13.

<sup>5</sup> *Mackbee v. Griffith*, 2 Cranch C. C. 336. Compare with *Lloyd v. Johnson*, 1 B. & P. 340; 2 Chit. Con. 11th Am. ed. 981.

<sup>6</sup> *Bowry v. Bennet*, 1 Camp. 348.

<sup>7</sup> Compare with the foregoing cases *Armfield v. Tate*, 7 Ire. 258; *Hanauer v. Doane*, 12 Wal. 342; *McGavock v. Puryear*, 6 Coldw. 84; *Michael v. Bacon*, 49 Misso. 474; *Taylor v. Chester*, Law Rep. 4 Q. B. 309.

therefore, to overturn — or promises in evasion of — what the law has established, or what it aims to promote ; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing or corrupting its officers in their official acts ; all, made to promote what the law holds to be wrong ; all, contrary to any rules which it has prescribed, — are void. If a court should enforce them, it would employ its functions in undoing what it was established to do. The act would be in the nature of suicide.

## CHAPTER XXVI.

CONTRACTS VOIDABLE UNDER THE STATUTE OF FRAUDS  
UNLESS EVIDENCED BY WRITING.

- § 498-501. Statute of Frauds and Introduction.
- 502-513. Rules Common to this Class.
- 514-516. Promise by Executors and Administrators.
- 517-524. Contract of Guaranty.
- 525-529. On Consideration of Marriage.
- 530-535. For the Sale of Lands.
- 536-545. Not to be performed within a Year.
- 546. Doctrine of the Chapter restated.

§ 498. **In General, of the Statute of Frauds.**—Just one hundred years prior to the Declaration of our National Independence, the parliament of the mother country gave being to the most important statute ever enacted in either country, relating to civil affairs. It is 29 Car. 2, c. 3, A. D. 1676, entitled “An Act for Prevention of Frauds and Perjuries.” With only slight amendments, and after a lapse of two hundred years, during which its influence has been constantly present in every avenue of business, it is still in force in England. It came subsequently to the settlement of the earlier American colonies, but it was accepted as law in Maryland<sup>1</sup> and probably in some of the others.<sup>2</sup> And, in all our States, with perhaps one or two exceptions, statutes have been enacted on the pattern of this one, yet with enough of slight differences from it and from one

<sup>1</sup> *Clayland v. Pearce*, 1 Har. & McH. 29; *Kilty Rep. Stats.* 240.

<sup>2</sup> *Bishop First Book*, § 54, 56, 58.

another to admonish every practitioner to consult and be guided by the statute-books of his own State.<sup>1</sup> This statute, whether spoken of as it exists in England or in any one of our States, is, in short phrase, termed the “Statute of Frauds.”

§ 499. **Changes effected.**—In its original English form, it is in twenty-five sections, extending to some things besides contract. We have seen,<sup>2</sup> that, by the prior common law, any ordinary agreement between parties might be made by oral words with the same effect as by written ones. This statute works a change as to some objects of contract, not as to all. It provides four or more different classes of rules, each to govern things particularized as within its class; and all requiring, to some extent, writing where oral words were before adequate. The class of rules and objects to be considered in this chapter depend on the —

§ 500. **Fourth Section**—as follows:—

“No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof: *unless* the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

§ 501. **How the Chapter divided.**—It is perceived that here are five different objects of contract, governed by the

<sup>1</sup> *Bowman v. Conn*, 8 Ind. 58; *Violett v. Patton*, 5 Cranch, 142; *Sorrell v. Jackson*, 30 Ga. 901; *D'Wolf v. Rabaud*, 1 Pet. 475; *Westheimer v. Peacock*, 2 Iowa, 528; *Dunn v. Tharp*, 4 Ire. Eq. 7; *Thornton v. Corbin*, 3 Call, 384; *Ball v. Ball*, 2 Bibb, 65; *Badon v. Bahan*, 4 La. An. 467; *Riddle v. Ratliff*, 8 La. An. 106; *Allen v. Moss*, 27 Misso. 354; *Gibson v. Chouteau*, 39 Misso. 536; *Monroe v. Searcey*, 20 Texas, 348.

<sup>2</sup> *Ante*, § 49.

same rules. We shall, therefore, consider, I. The Rules common to this Class ; II. The Promise by Executors and Administrators ; III. The Contract of Guaranty ; IV. The Agreement on Consideration of Marriage ; V. The Contract for the Sale of Lands ; VI. Agreements not to be Performed within a Year.

I. *The Rules common to this Class.*

§ 502. **Executed.** — If the reader will carefully note the terms of this statutory provision, he will see that they can have no application to contracts which are fully executed on both sides. All such, therefore, even though they were once executory, and thus within the statute, stand precisely as if the statute did not exist.<sup>1</sup>

§ 503. **Executed on one Side.** — There is a distinction between the consideration for an agreement and the agreement itself. Consequently if one has voluntarily done the thing which, being within the statute, he could not have been compelled to do, he may enforce payment for it — that is, recover the consideration orally agreed — from the other.<sup>2</sup> But if it is the consideration which has been thus voluntarily paid or performed, whether partly or even fully, this will not enable the person paying or performing to maintain a suit against the other who refuses performance ; because the statute expressly declares that no such action shall be maintained.<sup>3</sup> If the latter, who promised orally,

<sup>1</sup> *Stone v. Dennison*, 18 Pick. 1; *Bolton v. Tomlin*, 5 A. & E. 856; *Swanzey v. Moore*, 22 Ill. 63; *Nutting v. McCutcheon*, 5 Minn. 382; *Slatter v. Meek*, 35 Ala. 528; *McCue v. Smith*, 9 Minn. 252; *Westfall v. Parsons*, 16 Barb. 645; *Shaw v. Woodcock*, 7 B. & C. 73. See *Sanderson v. Graves*, Law Rep. 10 Ex. 284, 238, 241.

<sup>2</sup> *Sims v. McEwen*, 27 Ala. 184; *McGlucky v. Bitter*, 1 E. D. Smith, 618; *Ray v. Young*, 18 Texas, 550; *Zabel v. Schroeder*, 35 Texas, 308; *Philbrook v. Belknap*, 6 Vt. 389; *Knowlman v. Bluett*, Law Rep. 9 Ex. 1. See post, § 535, 545.

<sup>3</sup> *Kidder v. Hunt*, 1 Pick. 328; *Pierce v. Paine*, 28 Vt. 34; *Wood v. Jones*,

has performed in part, even as to almost the whole, he may there stop, and rely on the statute as to the residue.<sup>1</sup>

§ 504. **Remedies after Part Performance.** — When a part or all of the consideration has been paid, either in money or anything else, and the other party relying on the statute refuses performance, the money, or the value of the other thing, may be recovered back from him in a suit at law ;<sup>2</sup> but not, if he stands ready to perform.<sup>3</sup> There are cases of hardship, less simple in their facts, to which this sort of remedy is not adapted, and for some of them our forms of judicial procedure furnish no remedy ; but, —

§ 505. **In Equity.** — Before this Statute of Frauds was adopted, courts of equity, with forms more flexible than those of the common law, had a jurisdiction, which they still retain, to establish justice between parties one of whom has been defrauded by the other. And it is a palpable fraud for one man to entice another with promises to change his course of action and part with his effects or his services, and then fall back on the statute to avoid performing what he had led the other to expect. Therefore, in cases within this principle, and not remediable at the common law, equity will compel performance, or compel some other proper adjustment. On this, as on other questions, the courts of the present day follow the precedents, and the line of precedent is not at every point exactly what it should be ; though, as a whole, it has been wisely drawn.<sup>4</sup> This is not,

35 Texas, 64; *Flenner v. Flenner*, 29 Ind. 564; *Davis v. Moore*, 9 Rich. 215; *Osborn v. Phelps*, 19 Conn. 63; *Hawley v. Moody*, 24 Vt. 603.

<sup>1</sup> *Baldwin v. Palmer*, 6 Selden, 232.

<sup>2</sup> *Hawley v. Moody*, 24 Vt. 603; *Marquat v. Marquat*, 7 How. Pr. 417; *Baldwin v. Palmer*, 6 Selden, 232, 235; *Montague v. Garnett*, 3 Bush, 297.

<sup>3</sup> *Coughlin v. Knowles*, 7 Met. 57 (which compare with *King v. Welcome*, 5 Gray, 41, 44); *Swanzey v. Moore*, 22 Ill. 63; *Plummer v. Bucknan*, 55 Maine, 105.

<sup>4</sup> The fraud for which relief is given need not be actual fraud, but it is often constructive, — not fraud in fact, but in equitable law. And it has thus become a sort of leading doctrine, that, if the oral contract has been partly or fully

as the non-professional reader might deem, a violation of the statute; for every statute, even a written constitution, is, and ought to be, interpreted as subject to qualifications and exceptions derivable from principles outside itself, else no written law could be safely made, and unintended injustice could not be avoided.<sup>1</sup>

§ 506. **Not void—“No Action,” etc.**—Though, in the books, the mere verbal contract is sometimes spoken of as void,<sup>2</sup> it is not so in fact. “No action” shall be maintained to “charge” one upon it, but for all other purposes it is good.<sup>3</sup>

performed by him from whom the consideration proceeds, equity will compel its performance on the other side. But the exceptions are numerous; or, properly, an equity judge often declines to call that a part or full performance which every uneducated person would. Consult, as to this and the text, the books on equity jurisdiction; also, Browne Stat. Frauds, § 437-502; Nunn *v.* Fabian, Law Rep. 1 Ch. Ap. 35; Coles *v.* Pilkington, Law Rep. 19 Eq. 174; Caton *v.* Caton, Law Rep. 2 H. L. 127, 136, 1 Ch. Ap. 137; Jervis *v.* Berridge, Law Rep. 8 Ch. Ap. 351; Burnett *v.* Blackmar, 43 Ga. 569; Freeman *v.* Cooper, 14 Ga. 238; Gupton *v.* Gupton, 47 Misso. 37; Annan *v.* Merritt, 13 Conn. 478; Pugh *v.* Good, 3 Watts & S. 56; Watkins *v.* Watkins, 24 Ga. 402; Watson *v.* Mahan, 20 Ind. 228; Cole *v.* Potts, 2 Stock. 67; Malins *v.* Brown, 4 Comst. 403; Ryan *v.* Dox, 34 N. Y. 307; Coyle *v.* Davis, 20 Wis. 564; Blanchard *v.* McDougal, 6 Wis. 167; Parke *v.* Leewright, 20 Misso. 85; Brashier *v.* Gratz, 6 Wheat. 528; Brewer *v.* Brewer, 19 Ala. 481; Weber *v.* Marshall, 19 Cal. 447; Farrar *v.* Patton, 20 Misso. 81; Dickerson *v.* Chrisman, 28 Misso. 134; Ham *v.* Goodrich, 33 N. H. 32; Pinckard *v.* Pinckard, 23 Ala. 649; Davis *v.* Moore, 9 Rich. 215; Meach *v.* Stone, 1 D. Chip. 182; Osborn *v.* Phelps, 19 Conn. 63; Harder *v.* Harder, 2 Sandf. Ch. 17; Rhodes *v.* Rhodes, 8 Sandf. Ch. 279; Brizick *v.* Manners, 9 Mod. 284, 285; Taylor *v.* Luther, 2 Sumner, 228; Brandies *v.* Neustadtl, 18 Wis. 142; Fox *v.* Longly, 1 A. K. Mar. 388.

<sup>1</sup> Bishop Stat. Crimes, § 74, 82, 86, 88-90, 92, 102, 103, 123, 131.

<sup>2</sup> See ante, § 157.

<sup>3</sup> Leroux *v.* Brown, 12 C. B. 801; Fowler *v.* Burget, 16 Ind. 341; Crane *v.* Gough, 4 Md. 316; Sims *v.* Hutchins, 8 Sm. & M. 328; Minns *v.* Morse, 15 Ohio, 568; Potts *v.* Merrit, 14 B. Monr. 406; Philbrook *v.* Belknap, 6 Vt. 383; Swanzey *v.* Moore, 22 Ill. 63; Gray *v.* Gray, 2 J. J. Mar. 21; Harrow *v.* Johnson, 3 Met. Ky. 578; McCampbell *v.* McCampbell, 5 Litt. 92; Cornellison *v.* Cornellison, 1 Bush, 149; Lucas *v.* Mitchell, 3 A. K. Mar. 244. And see 1 Bishop Mar. Women, § 807, 810, 811.

The party may perform it if he will;<sup>1</sup> or, being sued, he may rely on the statute or not at his pleasure. He cannot be compelled.<sup>2</sup> Privies succeed to his right, yet the defence of the statute cannot be made by a stranger.<sup>3</sup> But —

§ 507. **Actions other than on Contract.** — The party may plead the statute in bar of a collateral action, based on the contract, as well as of a direct action on the contract itself.<sup>4</sup> Again, —

§ 508. **Rescission.** — A contract which the statute requires to be written may be rescinded orally.<sup>5</sup>

§ 509. *The “Memorandum or Note” of the Agreement:* —

**Distinguished from “Agreement” — Informal.** — The statute distinguishes between the “agreement” and “some memorandum or note thereof,” and declares the latter to be sufficient.<sup>6</sup> It may, therefore, be merely informal.<sup>7</sup> Hence —

§ 510. **Subsequent Recognition.** — A subsequent recognition, in writing, of a verbal agreement, will be adequate.<sup>8</sup> But it must be before the suit is brought.<sup>9</sup>

§ 511. **Signed.** — It must be “signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”<sup>10</sup> To be merely in the handwriting of

<sup>1</sup> *Aicardi v. Craig*, 42 Ala. 311; *Godden v. Pierson*, 42 Ala. 370; *Whitney v. Cochran*, 1 Scam. 209, 210.

<sup>2</sup> *Jacob v. Smith*, 5 J. J. Mar. 380; *Cahill v. Bigelow*, 18 Pick. 369; *Kirksey v. Kirksey*, 30 Ga. 156.

<sup>3</sup> *Chicago Dock Co. v. Kinzie*, 49 Ill. 289, 293; *Bohannon v. Pace*, 6 Dana, 194.

<sup>4</sup> *Davis v. Moore*, 9 Rich. 215; *Banks v. Crossland*, Law Rep. 10 Q. B. 97, 100.

<sup>5</sup> *Arrington v. Porter*, 47 Ala. 714; *Guthrie v. Thompson*, 1 Oregon, 353.

<sup>6</sup> *Ante*, § 500.

<sup>7</sup> *Hurley v. Brown*, 98 Mass. 545, 546.

<sup>8</sup> *Gale v. Nixon*, 6 Cow. 445. See *Adams v. McMillan*, 7 Port. 73.

<sup>9</sup> *Bill v. Bament*, 9 M. & W. 36; *Webster v. Zielly*, 52 Barb. 482.

<sup>10</sup> *Ante*, § 500; *Washington Ice Co. v. Webster*, 62 Maine, 341; *Barry v.*

such party is not sufficient.<sup>1</sup> But, if signed by him, the signature of the other party is unimportant.<sup>2</sup>

§ 512. **Consideration.** — To be binding, this contract, like any other, must proceed on a consideration.<sup>3</sup> But, in principle, if at common law a written contract need not express the consideration, which may be proved by oral evidence as already explained,<sup>4</sup> the result seems to follow, that the written memorandum under this statute need not mention it. The English courts, however, reasoning from the word “agreement,” in this section of the statute, require the consideration to be expressed, or to be inferable from what is expressed;<sup>5</sup> but, under the section relating to the contract for the sale of goods, which does not employ the same word, they hold that the memorandum need not state the consideration.<sup>6</sup> A part of our American tribunals hold to the English interpretation, while others do not require the consideration to be expressed in any case;<sup>7</sup> and the statutes of our States differ. Therefore, for further explanations, the reader should consult the authorities in his own State. Finally, —

§ 513. **Substantial Requisites.** — The memorandum,

Law, 1 Cranch C. C. 77; Sanborn *v.* Sanborn, 7 Gray, 142. As to what is a signing, see ante, § 95, 96. As to the authorization of the agent, see ante, § 219, 223, 224.

<sup>1</sup> *Champlin v. Parish*, 11 Paige, 405.

<sup>2</sup> *Reuss v. Picksley*, Law Rep. 1 Ex. 342; *Shirley v. Shirley*, 7 Blackf. 452; *Douglass v. Spears*, 2 Nott & McC. 207; *Morin v. Martz*, 13 Minn. 191; *McCrea v. Purmort*, 16 Wend. 460; *Davis v. Shields*, 26 Wend. 341; *Waul v. Kirkman*, 27 Missis. 823; *Justice v. Lang*, 42 N. Y. 493.

<sup>3</sup> *Tenney v. Prince*, 4 Pick. 385, 387; post, § 524.

<sup>4</sup> *Ante*, § 65.

<sup>5</sup> *Wain v. Warlters*, 5 East, 10; *Smith Con.* 2d Eng. ed. 41.

<sup>6</sup> *Egerton v. Mathews*, 6 East, 307; *Pollock Con.* 141.

<sup>7</sup> *Steadman v. Guthrie*, 4 Met. Ky. 147; *Shively v. Black*, 9 Wright, Pa. 345; *Britton v. Angier*, 48 N. H. 420; *Bean v. Valle*, 2 Misso. 126; *Sorrell v. Jackson*, 30 Ga. 901; *Cummings v. Dennett*, 26 Maine, 397; *Lent v. Padelford*, 10 Mass. 230; *Sears v. Brink*, 3 Johns. 210; *Thompson v. Blanchard*, 3 Comst. 335; *Violett v. Patton*, 5 Cranch, 142.

which may be on one piece of paper, or on more pieces than one, attached, or the one referring to the other, must, while it may be informal, still contain in substance the complete agreement in terms sufficiently plain to be understood.<sup>1</sup>

## II. *The Promise by Executors and Administrators.*

§ 514. **Consideration.** — If an executor or administrator should, in writing, promise to pay personally a debt of the deceased, this promise, though it fulfilled the terms of the statute, would not bind him unless made on some fresh consideration.<sup>2</sup> And, —

§ 515. **Form of the Promise.** — To bind him personally, the form of the undertaking must show this intent; a mere written promise as executor not being adequate. But he may be thus bound though he adds the word "executor" or "administrator" to his signature.<sup>3</sup>

§ 516. **Original Obligation.** — Executors and administrators, in the discharge of their duties, enter into various original obligations, as well as incur responsibilities for torts, which are personal in their inception; binding them, and not the estate, though sometimes they may charge over to the estate what they thus pay out. With these, the

<sup>1</sup> *Whelan v. Sullivan*, 102 Mass. 204; *McGuire v. Stevens*, 42 Missis. 724; *Riley v. Farnsworth*, 116 Mass. 223; *Lee v. Mahoney*, 9 Iowa, 344; *McConnell v. Brillhart*, 17 Ill. 354; *O'Donnell v. Leeman*, 48 Maine, 158; *Rhoades v. Castner*, 12 Allen, 180; *Bailey v. Ogden*, 3 Johns. 399; *Abeel v. Radcliff*, 13 Johns. 297; *Dodge v. Lean*, 13 Johns. 508; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274; *Patterson v. Underwood*, 29 Ind. 607; *Boardman v. Spooner*, 18 Allen, 353; *Hazard v. Day*, 14 Allen, 487; *Wright v. Weeks*, 25 N. Y. 158; *Murdock v. Anderson*, 4 Jones, Eq. 77; *Ellis v. Deadman*, 4 Bibb, 466; *Horsey v. Graham*, Law Rep. 5 C. P. 9; *Sale v. Lambert*, Law Rep. 18 Eq. 1; *Potter v. Duffield*, Law Rep. 18 Eq. 4; *Commins v. Scott*, Law Rep. 20 Eq. 11.

<sup>2</sup> 1 Chit. Con. 11th Am. ed. 372.

<sup>3</sup> *Treadwell v. Herndon*, 41 Missis. 38; *Winter v. Hite*, 3 Iowa, 142; *Lockwood v. Gilson*, 12 Ohio State, 526; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Sieckman v. Allen*, 3 E. D. Smith, 561. \*

statute has nothing to do.<sup>1</sup> But any mere verbal promise to pay a debt of the deceased is within the statute, and it will not bind the administrator personally.<sup>2</sup>

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### III. *The Contract of Guaranty.*

§ 517. **Statutory Terms.** — Within the statute is “any special promise to answer for the debt, default, or miscarriage of another.”<sup>3</sup>

§ 518. **Three Parties required.** — The statute, therefore, contemplates three parties, and it is applicable only where there are three; namely, a creditor, his debtor, and a person who guarantees to the former the latter's debt. And simply to this contract of guaranty do the statutory terms apply. Thus, —

§ 519. **Principal to be holden.** — The leading doctrine is, that, to render it necessary for the promise to be in writing, the principal must be and remain holden; that is, the debt must be due, not from the promisor, but from “another,” to whom the promisor sustains the relation of surety;<sup>4</sup> as, —

<sup>1</sup> *Beaty v. Gingles*, 8 Jones, N. C. 302; *Williams v. Davis* 18 Wis. 115; *Taylor v. Mygatt*, 26 Conn. 184; *Farrelly v. Ladd*, 10 Allen, 127; *Luscomb v. Ballard*, 5 Gray, 403; *Devane v. Royal*, 7 Jones, N. C. 426; *Bowman v. Tallman*, 2 Rob. N. Y. 385; *McGloin v. Vanderlip*, 27 Texas, 366; *Hackleman v. Miller*, 4 Blackf. 322; *Stebbins v. Smith*, 4 Pick. 97.

<sup>2</sup> *Smithwick v. Shepherd*, 4 Jones, N. C. 196.

<sup>3</sup> *Ante*, § 500.

<sup>4</sup> *Mallet v. Bateman*, Law Rep. 1 C. P. 163; *Lakeman v. Mountstephen*, Law Rep. 7 H. L. 17, 24, 7 Q. B. 196, 5 Q. B. 613 (at the place first cited, Lord Selborne observing: “There can be no suretyship unless there be a principal debtor, . . . nor can a man guarantee anybody's else debt unless there is a debt of some other person to be guaranteed”); *Eddy v. Roberts*, 17 Ill. 505; *Wainwright v. Straw*, 15 Vt. 215; *Mease v. Wagner*, 1 McCord, 395; *Bronson v. Stroud*, 2 McMullen, 372; *Hill v. Doughty*, 11 Ire. 195; *Connerat v. Goldsmith*, 6 Ga. 14; *Billingsley v. Dempewolf*, 11 Ind. 414; *Aldrich v. Jewell*, 12 Vt. 125; *Olive v. Lewis*, 45 Missis. 203; *Townsley v. Sumrall*, 2 Pet. 170, 181; *Floyd v. Harrison*, 4 Bibb, 76; *Wakefield v. Greenhood*, 29 Cal. 597; *Richardson v. Williams*, 49 Maine, 558; *Parker v. Barker*, 2 Met. 423; *Smith v. Montgomery*, 3 Texas, 199.

**§ 520. Goods bought.** — If A has goods which B wishes to buy, and X promises to pay for them, or to pay unless B does, then, in either case, if A delivers the goods and charges them deliberately to B, whom he intends to hold, while he also holds X as surety, or thus deliberately charges them to the two jointly, still X is not liable unless his promise is in writing.<sup>1</sup> But if the promise of X is in such form that the charge may be made directly to him, and it is so made, and no claim is retained against B, then X may be compelled to pay though there is no writing.<sup>2</sup> Again, —

**§ 521. Existing Debt.** — If a debtor, creditor, and third person agree together, that the debtor shall be discharged and the creditor look to the third person for his pay, this arrangement is valid though not in writing; because the debt, in being cast upon the third person, is taken off from the “other.” And the release of such other furnishes a consideration for the new promise.<sup>3</sup> But if the old debt is not lifted, the new promise must be in writing, and a fresh consideration must be added.<sup>4</sup>

**§ 522. Promise must be to Creditor, not to Debtor.** — In the foregoing illustrations, the promise was to the creditor. And no case in which it is not to him, or to some person representing him, is within the statute. If, therefore, one, on an adequate consideration, promises a debtor to pay

<sup>1</sup> *Matthews v. Milton*, 4 Yerg. 576; *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120; *Jones v. Cooper*, Cowp. 227; *Hill v. Raymond*, 3 Allen, 540; *Swift v. Pierce*, 13 Allen, 136.

<sup>2</sup> *Wallace v. Wortham*, 25 Missis. 119; *Graham v. O'Niel*, 2 Hall, 474; *Cahill v. Bigelow*, 18 Pick. 369.

<sup>3</sup> *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247; *Barringer v. Warden*, 12 Cal. 811; *Corbett v. Cochran*, 3 Hill, S. C. 41; *Day v. Cloe*, 4 Bush, 563; *Wood v. Corcoran*, 1 Allen, 405; *Warren v. Smith*, 24 Texas, 484; *Gleason v. Briggs*, 28 Vt. 185; *Watson v. Jacobs*, 29 Vt. 169; *Mead v. Keyes*, 4 E. D. Smith, 510; *Bill v. Barker*, 16 Gray, 62.

<sup>4</sup> *Beall v. Ridgeway*, 18 Ala. 117; *Comstock v. Breed*, 12 Cal. 286; *Cutler v. Everett*, 38 Maine, 201; *Aldridge v. Turner*, 1 Gill & J. 427; *Chaffee v. Thomas*, 7 Cow. 358; *Parker v. Carter*, 4 Munf. 273; *Stone v. Symmes*, 18 Pick. 467; *Brown v. Hazen*, 11 Mich. 219; *Noyes v. Humphreys*, 11 Grat. 636.

what the latter owes generally, or what he owes a particular person, this is valid though not in writing. The debt is not "another's," but the very person's to whom the promise is made.<sup>1</sup> An application of this doctrine occurs where there is a —

§ 523. **Promise of Indemnity.** — If a man promises one to see him harmless should he become surety for a third person, or should he do anything else, this is a mere arrangement between promisor and promisee. The promise is to pay what the person to whom it is made may become liable for, — not "another's" debt, but his. Therefore it is not within the statute of frauds, and is valid though oral.<sup>2</sup>

§ 524. **Consideration.** — Though a contract of guaranty is in writing, it must still, like any other, be founded on a consideration, or it will be invalid.<sup>3</sup> Therefore a mere

<sup>1</sup> *Eastwood v. Kenyon*, 11 A. & E. 438; *Hawes v. Woolcock*, 26 Wis. 627; *Britton v. Angier*, 48 N. H. 420; *Brown v. Brown*, 47 Misso. 130; *Barker v. Bradley*, 42 N. Y. 316; *Brown v. Strait*, 19 Ill. 88; *Presbyterian Society v. Staples*, 23 Conn. 544; *Colt v. Root*, 17 Mass. 229; *Tibbetts v. Flanders*, 18 N. H. 284; *Harwood v. Jones*, 10 Gill & J. 404; *Alger v. Scoville*, 1 Gray, 391; *Maxwell v. Haynes*, 41 Maine, 559; *Decker v. Schaffer*, 3 Ind. 187; *Howard v. Coshow*, 33 Misso. 118; *Kutzmeyer v. Ennis*, 3 Dutcher, 371; *Jennings v. Webster*, 7 Cow. 256; *Barker v. Bucklin*, 2 Denio, 45.

<sup>2</sup> *Aldrich v. Ames*, 9 Gray, 76; *Wildes v. Dudlow*, Law Rep. 19 Eq. 198; *Dunn v. West*, 5 B. Monr. 376; *Mills v. Brown*, 11 Iowa, 314; *Jones v. Shorter*, 1 Kelly, 294; *Lucas v. Chamberlain*, 8 B. Monr. 276; *Perley v. Spring*, 12 Mass. 297; *Chapin v. Lapham*, 20 Pick. 467; *Holmes v. Knights*, 10 N. H. 175; *Harrison v. Sawtel*, 10 Johns. 242; *Chapin v. Merrill*, 4 Wend. 657; *Sanborn v. Merrill*, 41 Maine, 467; *Blount v. Hawkins*, 19 Ala. 100; *Wyman v. Smith*, 2 Sandf. 331; *Seaman v. Whitney*, 24 Wend. 260; *Perkins v. Littlefield*, 5 Allen, 370; *Flemm v. Whitmore*, 23 Misso. 430; *Prather v. Vineyard*, 4 Gilman, 40; *Stack v. Raney*, 18 Cal. 622; *Marcy v. Crawford*, 16 Conn. 549; *Bohannon v. Jones*, 30 Ga. 488; *Tindal v. Touchberry*, 3 Strob. 177; *Myers v. Morse*, 15 Johns. 425; *Conkey v. Hopkins*, 17 Johns. 113; *Beaman v. Russell*, 20 Vt. 205; *Walker v. Norton*, 29 Vt. 226; *Soule v. Albee*, 31 Vt. 142; *Dorwin v. Smith*, 35 Vt. 69; *Goodspeed v. Fuller*, 46 Maine, 141. More or less distinctly opposed to the text, and to the foregoing and many other like decisions, are *Easter v. White*, 12 Ohio State, 219; *Kelsey v. Hibbs*, 13 Ohio State, 340; *Brush v. Carpenter*, 6 Ind. 78; *Draughan v. Bunting*, 9 Ire. 10; *Simpson v. Nance*, 1 Speer, 4; *Bissig v. Britton*, 59 Misso. 204.

<sup>3</sup> *Ante*, § 512, 519, 521; *Thomas v. Delphy*, 33 Md. 373; *Barrell v. Trussell*, 4 *Taunt*. 117.

naked promise to pay an existing debt of a third person cannot, though in writing, be enforced.<sup>1</sup> If the contract of the surety is simultaneous with that of the principal, the consideration which supports the one will sustain also the other; but, if subsequent, it must be on some fresh consideration.<sup>2</sup> Forbearance to sue, for example, is sufficient.<sup>3</sup> So is the release of a remedy.<sup>4</sup>

#### IV. *The Agreement on Consideration of Marriage.*

**§ 525. At Common Law — Under the Statute.** — Marriage is, at common law, an adequate consideration for a promise.<sup>5</sup> And the statute of frauds merely provides, that “any agreement made upon” this consideration shall, to be valid, be in writing.<sup>6</sup>

**§ 526. Defined.** — A “consideration of marriage” is an actual marriage, in exchange for which the promise is made;<sup>7</sup> as, —

**§ 527. Marriage Settlement, etc.** — If a man settles property on a woman in consideration that she shall marry him, then she does marry him; this “consideration of marriage” renders the settlement valid even as against his creditors.<sup>8</sup> And it is the same with a promise to settle

<sup>1</sup> *Starr v. Earle*, 43 Ind. 478; *Beall v. Ridgeway*, 18 Ala. 117; *Osborne v. Farmers' Loan, etc., Co.*, 16 Wis. 35.

<sup>2</sup> *Bebee v. Moore*, 3 McLean, 387; *How v. Kemball*, 2 McLean, 103; *Colburn v. Tolles*, 14 Conn. 341; *Lines v. Smith*, 4 Fla. 47; *Ware v. Adams*, 24 Maine, 177; *Gilligan v. Boardman*, 29 Maine, 79; *Cook v. Elliott*, 34 Misso. 586; *Brewster v. Silence*, 4 Seld. 207; *Snevily v. Johnston*, 1 Watts & S. 307.

<sup>3</sup> *Smith v. Finch*, 2 Scam. 321; *Martin v. Black*, 20 Ala. 309; *Sage v. Wilcox*, 6 Conn. 81; *Kean v. McKinsey*, 2 Barr, 30; *Thomas v. Croft*, 2 Rich. 118; *McCelvy v. Noble*, 13 Rich. 330; *King v. Upton*, 4 Greenl. 387; *Elting v. Vanderlyn*, 4 Johns. 237; *Vinal v. Richardson*, 18 Allen, 521.

<sup>4</sup> *Ante*, § 521; *Kershaw v. Whitaker*, 1 Brev. 9; *Killian v. Ashley*, 24 Ark. 511; *Taylor v. Meek*, 4 Blackf. 388; *Corbett v. Cochran*, 3 Hill, S. C. 41.

<sup>5</sup> *Ante*, § 424.

<sup>6</sup> *Ante*, § 500.

<sup>7</sup> *Ante*, § 406.

<sup>8</sup> 1 *Bishop Mar. Women*, § 777-784; *Mountague v. Maxwell*, 1 Stra. 236;

property, or any other promise which he makes to her or for her benefit, of a sort not to be extinguished by the marriage.<sup>1</sup> But, by the statute of frauds, such promise must be in writing. Or,—

§ 528. **By third Person.**—If a third person, by a writing which he has signed, promises a woman, or the man, that he will do a particular thing on their marriage, then they marry, this promise binds him, being founded on the “consideration of marriage.”<sup>2</sup> But,—

§ 529. **Promise to Marry.**—A mere promise to marry is not of this sort. Such a promise is generally mutual, so that the promise of one party is the consideration for that of the other; but, whether in a particular case this is so or not, it is not a promise on “consideration of marriage,”<sup>3</sup> and it need not be in writing.<sup>4</sup>

## V. *The Contract for the Sale of Lands.*

§ 530. **Executory—(Executed—Seal).**—The executed contract for the sale of land—that is, the deed conveying it—must be in writing and under seal, for reasons other than those within this sub-title.<sup>5</sup> What we are here to consider is the executory “contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,”

Potts *v.* Merrit, 14 B. Monr. 406; Finch *v.* Finch, 10 Ohio State, 501; Andrews *v.* Jones, 10 Ala. 400; Naill *v.* Maurer, 25 Md. 582; Pratt *v.* Wright, 5 Misso. 192; Woodward *v.* Woodward, 5 Sneed, Tenn. 49.

<sup>1</sup> Rivers *v.* Thayer, 7 Rich. Eq. 136; Marshall *v.* Morris, 16 Ga. 368; Naill *v.* Maurer, *supra*; Miller *v.* Goodwin, 8 Gray, 542; Sullings *v.* Richmond, 5 Allen, 187; Tarbell *v.* Tarbell, 10 Allen, 278; Kimbrough *v.* Davis, 1 Dev. Eq. 71; Boatright *v.* Wingate, 3 Brev. 423.

<sup>2</sup> 1 Bishop Mar. Women, § 785-787; Ogden *v.* Ogden, 1 Bland, 284.

<sup>3</sup> Ante, § 428-431; Standiford *v.* Gentry, 32 Misso. 477; Espy *v.* Jones, 37 Ala. 379; Allard *v.* Smith, 2 Met. Ky. 297.

<sup>4</sup> Cork *v.* Baker, 1 Stra. 34; Harrison *v.* Cage, 1 Ld. Raym. 386; Clark *v.* Pendleton, 20 Conn. 495; Ogden *v.* Ogden, 1 Bland, 284.

<sup>5</sup> Post, § 560.

which the statute requires to be in writing.<sup>1</sup> This executory contract, the reader perceives, need not be under seal.<sup>2</sup>

**§ 531. Questions numerous.** — The questions under this head are very many; and it is not possible, as under some others, so to manipulate the subject that all, or nearly all, shall be comprehended in a few larger propositions. The statute embraces —

**§ 532. Every Interest in Land — (Letting — License).** — Under a previous section of this statute of frauds,<sup>3</sup> a tenancy at will — which is a sort of interest in land — may be created without writing, where the tenant actually enters by permission;<sup>4</sup> but, under this section, there can be no valid oral agreement for such tenancy, not accompanied by possession.<sup>5</sup> Even for the occupancy of a particular lodging-room in a house, the contract, to bind the parties, must be in writing;<sup>6</sup> but, for board and lodgings generally in the house, it need not be.<sup>7</sup> And a license to do a thing on land is not necessarily, while it may be, for an “interest in or concerning” the land, which requires a writing.<sup>8</sup> Thus, —

**§ 533. Trees.** — Though standing trees are of the realty, and a contract for any interest in them must be in writing,<sup>9</sup>

<sup>1</sup> *Ante*, § 500; *Hairston v. Jaudon*, 42 Missis. 380; *Lumpkin v. Johnson*, 27 Ga. 485.

<sup>2</sup> *Wheeler v. Newton*, Prec. Ch. 16; *Martin v. Weyman*, 26 Texas, 460; *Worrall v. Munn*, 1 Seld. 229.

<sup>3</sup> 29 Car. 2, c. 3, § 1.

<sup>4</sup> *Withers v. Larrabee*, 48 Maine, 570; *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Pick. 102; *Mhoon v. Drizzle*, 3 Dev. 414; *Clark v. Smith*, 1 *Casey*, Pa. 137.

<sup>5</sup> *McMullen v. Riley*, 6 Gray, 500; *Vaughan v. Hancock*, 3 C. B. 766; *Hardy v. Winter*, 38 Miss. 106; *Duke v. Harper*, 6 Yerg. 280. Contra, under the New York statute, *Young v. Dake*, 1 Seld. 463; under the Indiana statute, *Huffman v. Starks*, 31 Ind. 474; and under the New Jersey statute, *Birckhead v. Cummins*, 4 Vroom, 44.

<sup>6</sup> *Inman v. Stamp*, 1 Stark. 12; Add. Con. 7th Eng. ed. 145.

<sup>7</sup> *Wright v. Stavert*, 2 Ellis & E. 721. See *Wilson v. Martin*, 1 Denio, 602; *Spinner v. Halstead*, 1 Denio, 606.

<sup>8</sup> 1 Chit. Con. 11th Am. ed. 418; *Houston v. Laffee*, 46 N. H. 505.

<sup>9</sup> *Owens v. Lewis*, 46 Ind. 488; *Hutchins v. King*, 1 Wal. 53; *Olmstead v.*

it is otherwise where one undertakes to cut them into cord-wood, and deliver it to the owner at so much a cord.<sup>1</sup> And,—

**§ 534. Distinction.** — Though the cases are not all reconcilable with one another, and the construction in a few of them is palpably contrary to the statute, the true distinction is, that, if any legal or equitable ownership, however slight, in anything which either at common law or in equity is deemed real estate, is the subject of the contract, or intended to pass by it, the statute of frauds requires it to be in writing; while, on the other hand, a license or agreement to do anything on, with, or about the realty need not be in writing, where no interest is to pass to the party.<sup>2</sup>

Niles, 7 N. H. 523; Kingsley *v.* Holbrook, 45 N. H. 313; Green *v.* Armstrong, 1 Denio, 550; McGregor *v.* Brown, 6 Selden, 114; Harrell *v.* Miller, 35 Missis. 700; Yeakle *v.* Jacob, 9 Casey, Pa. 376. But see Byassee *v.* Reese, 4 Met. Ky. 372; Cain *v.* McGuire, 13 B. Monr. 340; Whitmarsh *v.* Walker, 1 Met. 313; Clafin *v.* Carpenter, 4 Met. 580; Nettleton *v.* Sikes, 8 Met. 34.

<sup>1</sup> Killmore *v.* Howlett, 48 N. Y. 569. See Sterling *v.* Baldwin, 42 Vt. 306; Forbes *v.* Hamilton, 2 Tyler, 356; Freeman *v.* Headley, 4 Vroom, 523.

<sup>2</sup> As no legal doctrine is or can be the subject of a direct adjudication, so this was never thus adjudged; but, like other doctrines, it depends upon a just consideration of a combination of decisions, statutes, and reasons. Consult, among such other cases as the reader may have access to, the following: Angell *v.* Duke, Law Rep. 10 Q. B. 174; Sanderson *v.* Graves, Law Rep. 10 Ex. 234; Davis *v.* Walker, 4 Hayw. 295; Pitman *v.* Poor, 38 Maine, 237; Love *v.* Cobb, 63 N. C. 324; Riddle *v.* Brown, 20 Ala. 412; Copper Hill Mining Co. *v.* Spencer, 25 Cal. 18; Bowman *v.* Conn, 8 Ind. 58; Scoggin *v.* Slater, 22 Ala. 687; Rhodes *v.* Otis, 33 Ala. 578; Gore *v.* McBrayer, 18 Cal. 582; Bostwick *v.* Leach, 3 Day, 476; Frear *v.* Hardenbergh, 5 Johns. 272; Onderdonk *v.* Lord, Hill & D. 129; Howard *v.* Easton, 7 Johns. 205; Phillips *v.* Thompson, 1 Johns. Ch. 181; Finch *v.* Finch, 10 Ohio State, 501; Hogg *v.* Wilkins, 1 Grant, Pa. 67; Richards *v.* Richards, 9 Gray, 313; Barnet *v.* Dougherty, 8 Casey, Pa. 371; Trammell *v.* Trammell, 11 Rich. 471; Carroway *v.* Anderson, 1 Humph. 61; May *v.* Baskin, 12 Sm. & M. 428; Buck *v.* Pickwell, 27 Vt. 157; Barnard *v.* Whipple, 29 Vt. 401; Bliss *v.* Thompson, 4 Mass. 488, 491; Cook *v.* Stearns, 11 Mass. 533; Hall *v.* McLeod, 2 Met. Ky. 98; Wright *v.* DeGroff, 14 Mich. 164; Folsom *v.* Great Falls Manuf. Co., 9 N. H. 355; New Orleans, etc., Railroad *v.* Moyer, 39 Missis. 374; Keyser *v.* School District, 35 N. H. 477; Fisher *v.* Fields, 10 Johns. 495; Benedict *v.* Bebee, 11 Johns. 145; Smith *v.* Burnham, 8 Sumner, 435; Henley *v.* Brown, 1 Stew. 144; Chambliss *v.* Smith, 30 Ala.

§ 535. **Consideration.**—Returning to a distinction already mentioned,<sup>1</sup> if a conveyance bargained for is actually made, any oral promise regarding the consideration—as, to pay for the land—is good.<sup>2</sup> But, even then, if the consideration itself is something concerning lands, within this statute of frauds, the promise to perform the thing must be in writing to be valid.<sup>3</sup>

## VI. *Agreements not to be performed within a Year.*

§ 536. **Terms of the Provision.**—Though an agreement may not be within any one of the four classes already considered, yet, if it “is not to be performed within the space of one year from the making thereof,” it must, to bind the parties, be in writing.<sup>4</sup> The reader perceives, that, by these express words, unless the terms of the agreement affirmatively carry the completed doing of the thing beyond the year, it is not a case in which a writing is required. Therefore—

§ 537. **May or must.**—The leading doctrine under this head is, that a writing is essential or not according as the

366; *Hammond v. Cadwallader*, 29 Misso. 166; *Graves v. Graves*, 45 N. H. 323; *Newnan v. Carroll*, 3 Yerg. 18; *Ledford v. Ferrell*, 12 Ire. 285; *Bryant v. Hendricks*, 5 Iowa, 256; *Bannon v. Bean*, 9 Iowa, 395; *Owen v. Estes*, 5 Mass. 330; *Bruce v. Hastings*, 41 Vt. 380; *James v. Drake*, 39 Texas, 143; *White v. Butt*, 32 Iowa, 335; *Gould v. Mansfield*, 108 Mass. 408; *Copeland v. Wading River Reservoir*, 105 Mass. 397; *Thayer v. Rock*, 18 Wend. 53; *Detroit*, etc., *Railroad v. Forbes*, 30 Mich. 165.

<sup>1</sup> *Ante*, § 503; *post*, § 545.

<sup>2</sup> *Price v. Sturgis*, 44 Cal. 591; *Whitbeck v. Whitbeck*, 9 Cow. 266; *Nutting v. Dickinson*, 8 Allen, 540; *Basford v. Pearson*, 9 Allen, 387; *Mason v. Mason*, 3 Bush, 35; *Mott v. Hurd*, 1 Root, 78; *Gillet v. Burr*, 1 Root, 74; *Bradley v. Blodget*, Kirby, 22; *Nickerson v. Saunders*, 36 Maine, 413; *Thayer v. Viles*, 23 Vt. 494; *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549; *Smith v. Goulding*, 6 Cush. 154; *Short v. Woodward*, 13 Gray, 86; *Trowbridge v. Wetherbee*, 11 Allen, 361. And see *Lower v. Winters*, 7 Cow. 268.

<sup>3</sup> *Townsend v. Townsend*, 6 Met. 319; *Patterson v. Cunningham*, 3 Fairf. 506.

<sup>4</sup> *Ante*, § 500.

completed doing of the thing must, by the terms of the agreement, necessarily be postponed beyond the year, or may fall within it: as, if the performance depends on the death of a person, or the coming in of a ship, or any other contingent event which may or may not transpire within the year, no writing is required; otherwise, if there is a fixed date, forward more than a year.<sup>1</sup> Thus,—

§ 538. **Agreement to marry.**—An agreement in general words to marry, or to marry within three years, need not be in writing, because it can be performed within a year;<sup>2</sup> but a promise to marry after the lapse of a year is void if oral.<sup>3</sup> Again,—

§ 539. **Ante-nuptial Contract.**—If, in a particular instance, an ante-nuptial contract concerning the disposition of property to heirs is not required to be in writing as founded on the consideration of marriage,<sup>4</sup> neither need it be, by force of the present clause; because the parties may marry and die within a year.<sup>5</sup> And—

<sup>1</sup> *Souch v. Strawbridge*, 2 C. B. 808; *Knowlman v. Bluett*, Law Rep. 9 Ex. 1; *Russell v. Slade*, 12 Conn. 455; *Burney v. Ball*, 24 Ga. 505; *Wiggins v. Keizer*, 6 Ind. 252; *Ellicott v. Peterson*, 4 Md. 476; *Peters v. Westborough*, 19 Pick. 364; *Soggins v. Heard*, 31 Mississ. 426; *Foster v. McO'Blenis*, 18 Miss. 88; *Surgett v. Cason*, 26 Miss. 221; *Blanding v. Sargent*, 33 N. H. 239; *Esty v. Aldrich*, 46 N. H. 127; *Moore v. Fox*, 10 Johns. 244; *Lockwood v. Barnes*, 3 Hill, N. Y. 128; *Broadwell v. Getman*, 2 Denio, 87; *Gadsden v. Lance*, 1 McMUL. Eq. 87; *Izard v. Izard*, 1 Des. 116; *Thompson v. Gordon*, 3 Strob. 196; *Thouvenin v. Lea*, 26 Texas, 612; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Blanchard v. Weeks*, 34 Vt. 589; *Rogers v. Brightman*, 10 Wis. 55; *White v. Hanchett*, 21 Wis. 415; *Packet Co. v. Sickles*, 5 Wal. 580; *Harris v. Porter*, 2 Harring. Del. 27; *Comstock v. Ward*, 22 Ill. 248; *Herrin v. Butters*, 20 Maine, 119; *Summerall v. Thoms*, 3 Fla. 298; *Shipley v. Patton*, 21 Ind. 169; *Holbrook v. Armstrong*, 1 Fairf. 31; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 805.

<sup>2</sup> *Paris v. Strong*, 51 Ind. 389; *Withers v. Richardson*, 5 T. B. Monr. 94.

<sup>3</sup> *Nichols v. Weaver*, 7 Kan. 373; *Derby v. Phelps*, 2 N. H. 515.

<sup>4</sup> *Ante*, § 527.

<sup>5</sup> *Houghton v. Houghton*, 14 Ind. 505. Within the same principle, see *Hill v. Jamieson*, 16 Ind. 125; *Richardson v. Pierce*, 7 R. I. 380; *Lyon v. King*, 11 Met. 411; *Worthy v. Jones*, 11 Gray, 168; *Doyle v. Dixon*, 97 Mass. 208.

**§ 540. Support during Life.** — An undertaking to support one during his life is of the same sort ; it need not be in writing, because he may die before the year is ended.<sup>1</sup> So —

**§ 541. Work during Another's Life.** — An agreement to work for another while he lives, need not be in writing ; because death may end it within the year.<sup>2</sup>

**§ 542. Other Labor Agreements.** — If one agrees to labor for another more than a year, though to be paid at intervals of less, he cannot be required to do any part of the work, or to respond in damages for not doing it, unless the agreement is in writing.<sup>3</sup> And it is the same with any other form of undertaking to work for more than a year.<sup>4</sup> But, —

**§ 543. While in Employ.** — If the agreement is to work for a company while a particular agent is in its employ, this is not within the statute of frauds ; for perhaps the agent may cease to serve the company before the year closes.<sup>5</sup> Also, —

**§ 544. By Will.** — A promise to pay for services by a bequest is good, though oral ; because the promisor may not live a year.<sup>6</sup>

**§ 545. Executed on One Side.** — If services have been rendered, or goods or lands delivered, under an oral con-

<sup>1</sup> *Bull v. McCrea*, 8 B. Monr. 422 ; *Howard v. Burgen*, 4 Dana, 137 ; *Hutchinson v. Hutchinson*, 46 Maine, 154 ; *Dresser v. Dresser*, 35 Barb. 573. But see the argument of counsel and authorities cited in *Knowlman v. Bluett*, Law Rep. 9 Ex. 1, 8.

<sup>2</sup> *Updike v. Ten Broeck*, 3 Vroom, 105.

<sup>3</sup> *Emery v. Smith*, 46 N. H. 151 ; *Tuttle v. Swett*, 31 Maine, 555 ; *Hill v. Hooper*, 1 Gray, 131 ; *Giraud v. Richmond*, 2 C. B. 835. On the same principle, see *Holloway v. Hampton*, 4 B. Monr. 415.

<sup>4</sup> *Kelly v. Terrell*, 26 Ga. 551 ; *Scoggin v. Blackwell*, 36 Ala. 351 ; *Nones v. Homer*, 2 Hilton, 116 ; *Amburger v. Marvin*, 4 E. D. Smith, 393 ; *Little v. Wilson*, 4 E. D. Smith, 422 ; *Squire, v. Whipple*, 1 Vt. 69 ; *Hinckley v. Southgate*, 11 Vt. 428 ; *Pitcher v. Wilson*, 5 Misso. 46 ; *Drummond v. Burrell*, 13 Wend. 307.

<sup>5</sup> *Roberts v. Rockbottom Co.*, 7 Met. 46.

<sup>6</sup> *Jilson v. Gilbert*, 26 Wis. 637.

tract, which, within this clause, ought to have been in writing, the party benefited must pay for them, as we have already seen.<sup>1</sup> But, if the payment is executory, and by the terms of the contract is not to be made until after a year, some courts hold that this part of the agreement is void, though the other is executed;<sup>2</sup> while other courts accept the oral promise as good.<sup>3</sup> It is easy to see, that, in such a case, the court should not permit the defendant to set up the fact of this express promise being oral to annul any promise of payment which the law would imply;<sup>4</sup> but difficult to perceive how an action could be maintained on the express promise itself, contrary to the inhibition of the statute.<sup>5</sup> The true question, therefore, is, — Will the law imply a promise, in exact terms with an express one, to be relied on in the stead of the express one, which the statute declares to be void? If it will, then the doctrine must be, that an implication — a mere fiction of the common law — may override the words of a statute.

#### § 546. *The Doctrine of this Chapter restated.*

The Statute of Frauds, in the section under consideration in this chapter, has no relation to contracts which are executed on both sides. Its words are, “No action shall be brought,” etc.<sup>6</sup> If, therefore, the thing agreed is done, so that there is no occasion for an action, the case is not within the statute. Again, the doing, pursuant to an oral agree-

<sup>1</sup> *Ante*, § 503, 535; *Montague v. Garnett*, 3 Bush, 297; *Harwood v. Jones*, 10 Gill & J. 404; *Hill v. Smith*, 12 Rich. 698; *Tatterson v. Suffolk Manuf. Co.*, 106 Mass. 56.

<sup>2</sup> *Marcy v. Marcy*, 9 Allen, 8.

<sup>3</sup> *Berry v. Doremus*, 1 Vroom, 399; *Jilson v. Gilbert*, 26 Wis. 637.

<sup>4</sup> See *King v. Welcome*, 5 Gray, 41; *Compton v. Martin*, 5 Rich. 14; *Swanzey v. Moore*, 22 Ill. 63.

<sup>5</sup> *Sheehy v. Adarene*, 41 Vt. 541.

<sup>6</sup> *Ante*, § 500.

ment, of a thing within the statute, is a good consideration for a promise to perform something not within it ; and, on this mere oral promise, an action may be maintained. But, on the other hand, where the thing orally promised is within the statute, no action will lie on this promise, whatever the nature of the consideration, and though it has been paid or performed. Once more, the statute does not abrogate anything in the common law of contracts ; it merely provides, that, in some cases, and to some extent, common-law requisites shall be reduced to writing. Consequently, though a contract is in writing, and within all the statutory requirements, it will be invalid if it would have been so before the enactment of the statute.

Such is the general doctrine, running through the entire section. Descending to the specific clauses, it is believed that no appended statement can make plainer what is laid down in the foregoing expositions. They are all of prime importance, and a careful reperusal of the last five subtitles will be more helpful than could be anything further in this place.

## CHAPTER XXVII.

## SALES OF GOODS VOID BY THE STATUTE OF FRAUDS.

§ 547. **Formalities aside from Statute.**—Aside from the statute of frauds, an executory contract for the purchase and sale of goods does not differ from any other; requiring only the mutual consent of the parties, expressed either orally or in writing, and a consideration. To complete the sale, so that the title will pass to the buyer, the goods must be separated from the bulk of which they are a part, or in some other way be so distinguished or specified that they can be known; and the terms must be definitively agreed upon. But neither actual delivery nor payment is indispensable.<sup>1</sup> The buyer may then take possession of them, “on payment or tender of the price, and not otherwise,” where nothing had been arranged as to the time of payment or of delivery, or without payment if there had been an affirmative agreement for credit.<sup>2</sup> A third person, who has attached the goods as the seller’s, or bought them of him, occupies a different position; and, as against him,

<sup>1</sup> 2 Kent. Com. 492; 1 Chit. Con. 11th Am. ed. 518-528; *De Fonclear v. Shotenkirk*, 3 Johns. 170; *Carter v. Jarvis*, 9 Johns. 143; *Gardiner v. Suydam*, 3 Seld. 357; *McClung v. Kelley*, 21 Iowa, 508; *Tome v. Dubois*, 6 Wal. 548; *Folsom v. Moore*, 19 Maine, 252; *Stone v. Peacock*, 35 Maine, 385; *McCoy v. Moss*, 5 Port. 88; *Cockrell v. Warner*, 14 Ark. 145; *Walden v. Murdock*, 23 Cal. 540; *Wilson v. Stratton*, 47 Maine, 120; *Sweeney v. Owsley*, 14 B. Monr. 413; *Doremus v. Howard*, 3 Zab. 390; *Connor v. Williams*, 2 Rob. N. Y. 46; *Dunlap v. Berry*, 4 Scam. 327; *Wing v. Clark*, 24 Maine, 366; *Goodrum v. Smith*, 3 Humph. 542; *Broyles v. Lowrey*, 2 Sneed, Tenn. 22; *Hudson v. Weir*, 29 Ala. 294; *Riddle v. Varnum*, 20 Pick. 280; *McLaughlin v. Piatti*, 27 Cal. 451.

<sup>2</sup> 2 Kent Com. 492; *Atwood v. Lucas*, 53 Maine, 508.

to render the title of the first purchaser complete, they are required to have been paid for, or delivered, or both, or neither, according to the circumstances, and the varying adjudications of the different tribunals.<sup>1</sup>

**§ 548. What for this Chapter.**—These views are introductory, and the topic will not be further pursued. Through the remainder of this chapter, we are to consider the effect of the statute of frauds upon sales of personal property and executory agreements for its sale.

**§ 549. Terms of the Statute.**—By the parent statute of frauds, in a section distinct from the one explained in the last chapter,<sup>2</sup> it is provided, that —

“No contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good; except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.”<sup>3</sup>

**§ 550. “Goods, Wares,” etc.**—This statute does not extend to every personal thing which is the subject of sale, but only to “goods, wares, and merchandise;” which words, while they comprehend most of what is classed as personal property, do not all.<sup>4</sup> They have been interpreted

<sup>1</sup> *Caster v. Davies*, 8 Ark. 213; *Davis v. Ransom*, 4 Mich. 238; *Woodburn v. Cogdal*, 39 Misso. 222; *Samuels v. Gorham*, 5 Cal. 226; *Jorda v. Lewis*, 1 La. An. 59; *Vining v. Gilbreth*, 39 Maine, 496; *Barr v. Reitz*, 3 Smith, Pa. 256; *Pierce v. Chapman*, 8 Vt. 334, 337; *Foster v. Wallace*, 2 Misso. 231; *Ludwig v. Fuller*, 17 Maine, 162; *Kendall v. Hughes*, 7 B. Monr. 368; *Veazie v. Somerby*, 5 Allen, 280; *Lake v. Morris*, 30 Conn. 201; *Marshall v. Morehouse*, 14 La. An. 689; *Short v. Tinsley*, 1 Met. Ky. 397; *Howland v. Harris*, 4 Mason, 497; *Sawyer v. Nichols*, 40 Maine, 212; *Tanneret v. Edwards*, 18 La. An. 606; *Rockwood v. Collamer*, 14 Vt. 141; *Stephenson v. Clark*, 20 Vt. 624; *Berry v. Ensell*, 2 Grat. 333; *Parsons v. Dickinson*, 11 Pick. 352.

<sup>2</sup> *Ante*, § 498-500.

<sup>3</sup> 29 Car. 2, c. 3, § 17.

<sup>4</sup> See, as to statutory terms of this sort in the criminal law, *Bishop Stat. Crimes*, § 209, 345.

liberally ; even, by some American courts, to include corporation stocks,<sup>1</sup> bank notes,<sup>2</sup> and promissory notes.<sup>3</sup> Other of our courts<sup>4</sup> and the English stop short of this ; and, in the latter, they are held not to extend to stocks.<sup>5</sup> In actual usage among the dealers in various sorts of personal property, it is believed that the instruments of trade and commerce, such as bank bills and promissory notes, and *quasi*-partnership interests in corporate enterprises, called stocks, are not often designated as “goods, wares, and merchandise ;” though, like men’s souls, they are not unfrequently in the market, and bought and sold. Again,—

§ 551. **Labor and Materials.**—Labor and materials are not within these statutory words ; therefore an agreement with a mechanic to manufacture an article, furnishing whatever is to be used about the work, need not be in writing.<sup>6</sup> But if the contract is for merchandise, as distinguished from a special bargain to make and deliver a particular article, the case is within the statute, though the thing bargained for is to be delivered in the future, and it does not affirmatively appear to be yet manufactured, and it is not in fact.<sup>7</sup> Again,—

<sup>1</sup> *Tisdale v. Harris*, 20 Pick. 9 ; *North v. Forest*, 15 Conn. 400 ; *Southern Ins., etc., Co. v. Cole*, 4 Fla. 359 ; *Colvin v. Williams*, 3 Har. & J. 38.

<sup>2</sup> *Riggs v. Magruder*, 2 Cranch C. C. 143.

<sup>3</sup> *Baldwin v. Williams*, 3 Met. 365 ; *Gooch v. Holmes*, 41 Maine, 523.

<sup>4</sup> *Whittemore v. Gibbs*, 4 Fost. N. H. 484 ; *Beers v. Crowell, Dudley, Ga.* 28 ; *Hudson v. Weir*, 29 Ala. 294.

<sup>5</sup> *Bowlby v. Bell*, 3 C. B. 284 ; *Humble v. Mitchell*, 11 A. & E. 205 ; *Watson v. Spratley*, 10 Exch. 222 ; *Tempest v. Kilner*, 3 C. B. 249 ; *Knight v. Barber*, 16 M. & W. 66 ; *Heseltine v. Siggers*, 1 Exch. 856.

<sup>6</sup> *Parsons v. Loucks*, 48 N. Y. 17 ; *Cummings v. Dennett*, 26 Maine, 397 ; *Finney v. Apgar*, 2 Vroom, 266 ; *Crookshank v. Burrell*, 18 Johns. 58 ; *Abbott v. Gilchrist*, 38 Maine, 260 ; *Allen v. Jarvis*, 20 Conn. 38 ; *Mixer v. Howarth*, 21 Pick. 205 ; *Spencer v. Cone*, 1 Met. 283 ; *Phipps v. McFarlane*, 3 Minn. 109. And, as relating to this principle, consult *Rentch v. Long*, 27 Md. 188 ; *Bird v. Muhlinbrink*, 1 Rich, 199 ; *Eichelberger v. McCauley*, 5 Har. & J. 213 ; *Gadsden v. Lance*, 1 McMul. Eq. 87 ; *Woodford v. Patterson*, 32 Barb. 680 ; *Suber v. Pullin*, 1 S. C. 273 ; *Whitehead v. Root*, 2 Met. Ky. 584.

<sup>7</sup> *Lamb v. Crafts*, 12 Met. 353, 356 ; *Edwards v. Grand Trunk Railway*, 54 Maine, 105 ; *Waterman v. Meigs*, 4 Cush. 497 ; *Jackson v. Covert*, 5 Wend.

§ 552. **Price.**—The contract is not within the statute, therefore is governed by the common-law rules, where the price is less than a certain sum. We have seen, that, in England,<sup>1</sup> this sum is ten pounds; in Massachusetts,<sup>2</sup> Indiana,<sup>3</sup> and New York<sup>4</sup> respectively, it is fifty dollars, which is probably not uncommon with us. In Maine<sup>5</sup> and New Jersey<sup>6</sup> it is thirty dollars. If several articles are sold together, no one of which amounts to the statutory sum, yet collectively they do, the case is within the statute.<sup>7</sup>

§ 553. **Memorandum.**—What was said of the memorandum in the last chapter<sup>8</sup> will answer also for this. But no writing is necessary where any one of the things about to be mentioned occurs; namely,—

§ 554. **“Accept and Receive.”**—If the “buyer shall accept part of the goods so sold, and actually receive the same,” or the whole, no other formality is necessary; though, of course, there must still be a contract of sale, valid at common law.<sup>9</sup> And it is immaterial that the transfer is on a day subsequent to the making of the oral bargain.<sup>10</sup> There are some nice questions as to what amounts to a delivery.<sup>11</sup>

139; *Sawyer v. Ware*, 36 Ala. 675; *Newman v. Morris*, 4 Har. & McH. 421; *Garbutt v. Watson*, 5 B. & Ald. 618.

<sup>1</sup> *Ante*, § 549.

<sup>2</sup> *Mass. Gen. Stats. c. 105*, § 5.

<sup>3</sup> *Smith v. Smith*, 8 Blackf. 208.

<sup>4</sup> *Dykers v. Townsend*, 24 N. Y. 57.

<sup>5</sup> *Bucknam v. Nash*, 3 Fairf. 474.

<sup>6</sup> *Carman v. Smick*, 3 Green, N. J. 252.

<sup>7</sup> *Gilman v. Hill*, 36 N. H. 311.

<sup>8</sup> *Ante*, § 509-518.

<sup>9</sup> *Outwater v. Dodge*, 7 Cow. 85; *Denny v. Williams*, 5 Allen, 1; *Outwater v. Dodge*, 6 Wend. 397; *Houghtaling v. Ball*, 19 Misso. 84; *Ross v. Welch*, 11 Gray, 285; *Vincent v. Germond*, 11 Johns. 283; *McTaggart v. Rose*, 14 Ind. 230; *Denmead v. Glass*, 30 Ga. 637; *Davis v. Eastman*, 1 Allen, 422; *Chamberlin v. Robertson*, 31 Iowa, 408; *Malone v. Plato*, 22 Cal. 103.

<sup>10</sup> *Bush v. Holmes*, 53 Maine, 417; *McKnight v. Dunlop*, 1 Seld. 537; *Field v. Runk*, 2 Zab. 525; *Veazie v. Holmes*, 40 Maine, 69; *Marsh v. Hyde*, 3 Gray, 331.

<sup>11</sup> See the last two notes; also 1 Chit. Con. 11th Am. ed. 554 et seq.

§ 555. **“Earnest.”** — The statute distinguishes between giving a thing in “earnest,” and giving it in part payment; so that, though part payment may be deemed one form of earnest, and the delivery of a part of the goods another form, the meaning of the word here is any money or other article of value, however small in worth, which the buyer passes to the seller by whom it is accepted in token of good faith.<sup>1</sup> But it must be retained by the latter, or it is not “earnest.”<sup>2</sup> “It has fallen,” says Kent, “into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It has been omitted in the New York Revised Statutes.”<sup>3</sup> Therefore, instead of earnest, where there is neither a writing nor a delivery of goods, the buyer commonly resorts to the other alternative; namely,—

§ 556. **Part Payment.** — The bargain, in such a case, is good if the “buyer” shall “give something in part payment;”<sup>4</sup> otherwise, it is not.<sup>5</sup> And,—

§ 557. **Void.** — When there is any non-compliance with the section of the statute of frauds discussed in this chapter, the contract is not, as under the section examined in the last, voidable,<sup>6</sup> but it is void.<sup>7</sup> The difference appears in the statutory words themselves.

<sup>1</sup> See and compare, in connection with the terms of the statute itself, the word “Earnest” in the law dictionaries; also 2 Kent Com. 495 and note; 2 Bl. Com. 447, 448; Add. Con. 7th Eng. ed. 449, 450; 1 Chit. Con. 11th Am. ed. 519, 520, 564, 565; Blakey *v.* Dinsdale, Cowp. 661, 664; Bach *v.* Owen, 5 T. R. 409, 410; Langfort *v.* Tiler, 1 Salk. 118.

<sup>2</sup> Blenkinsop *v.* Clayton, 1 Moore, 328, 7 Taunt. 597.

<sup>3</sup> 2 Kent Com. 495, note.

<sup>4</sup> Ante, § 549; Pierce *v.* Gibson, 2 Ind. 408.

<sup>5</sup> Kirby *v.* Johnson, 22 Misso. 354.

<sup>6</sup> Ante, § 506.

<sup>7</sup> Alderton *v.* Buchoz, 3 Mich. 322; Daniel *v.* Frazer, 40 Missis. 507; Head *v.* Goodwin, 87 Maine, 181.

*§ 558. The Doctrine of this Chapter restated.*

The section of the Statute of Frauds considered in this chapter differs from the one before discussed in the following particulars: A contract not conforming to its provisions is void, instead of voidable as under the other section; and, while, under the other, a writing is always required, under this it is but one among alternative methods by which the contract is made good. On the other hand, this section, like the other, renders no contract valid which was not so at the common law.

## CHAPTER XXVIII.

## OTHER CONTRACTS AS REQUIRING SPECIAL FORMS OR NOT.

§ 559. **General Rule, etc.** — Still remembering that, in the absence of any special rule, an oral contract is equally effective with a written one,<sup>1</sup> let us see how the question stands as to a few other particular contracts.

§ 560. **Conveyances of Land.** — As we have already incidentally seen,<sup>2</sup> a deed of real estate conveying the freehold must be in writing under seal, irrespective of the statute of frauds.<sup>3</sup> This statute is silent as to the seal ; but it requires every sort of conveyance of land (except leases for three years or less, reduced, in some of our States, to one year), and all contracts for any interest in land, to be in writing.<sup>4</sup> But —

§ 561. **Receive Seisin.** — The authority to receive seisin may be orally conferred.<sup>5</sup> Again, —

§ 562. **Trusts.** — By the parent statute of frauds, express trusts in real estate can be created only by writing, but this does not extend to implied trusts.<sup>6</sup> This provision has been generally adopted in our States.<sup>7</sup>

§ 563. **Assignment.** — The contract termed an assign-

<sup>1</sup> *Ante*, § 49, 499.

<sup>2</sup> *Ante*, 27, 47, 530.

<sup>3</sup> *Crowell v. Maughs*, 2 Gilman, 419; *McCabe v. Hunter*, 7 Misso. 355; *Switzer v. Knapps*, 10 Iowa, 72; *Arms v. Burt*, 1 Vt. 303.

<sup>4</sup> *Ante*, § 530, 535; 4 *Kent Com.* 450 et seq.; *Steel v. Payne*, 42 Ga. 207; *Crowell v. Maughs*, *supra*; *Whitney v. Swett*, 2 *Fost. N. H.* 10; *Veghte v. Raritan Water Power Co.*, 4 *C. E. Green*, 142; *Sicard v. Davis*, 6 *Pet.* 124, 135.

<sup>5</sup> *Pratt v. Putnam*, 18 *Mass.* 361; *Reed v. Marble*, 10 *Paige*, 409.

<sup>6</sup> 29 *Car. 2, c. 1*, § 7-9; *Throop v. Hatch*, 3 *Abb. Pr.* 23.

<sup>7</sup> 4 *Kent Com.* 305; *Ready v. Kearsley*, 14 *Mich.* 215; *Kane v. Gott*, 24 *Wend.* 641; *Church v. Sterling*, 16 *Conn.* 388; *Moore v. Moore*, 38 *N. H.* 382; *Fleming v. Donahoe*, 5 *Ohio*, 255; *Rasdall v. Rasdall*, 9 *Wis.* 379.

ment, and the contract-interest thereby transferred, are distinct things ; so that, though the latter was created by a writing, or even by an instrument under seal, the former may be oral.<sup>1</sup> Even a judgment may be orally assigned.<sup>2</sup> These propositions include another, namely, that a record or specialty may be assigned by writing without seal.<sup>3</sup> Yet an assignment, like any other contract, may, by a distinct provision of law, be required to be under seal. Thus,—

**§ 564. Interest in Land.**—By the statute of frauds, as we have seen,<sup>4</sup> there can be no valid conveyance even of an equitable interest in real estate except by writing. Whence it follows, that, if one has a bond for a deed, he cannot make a valid oral assignment of it, as between himself and his assignee ; though, as the defence under the fourth section is personal only,<sup>5</sup> the maker of the bond could not plead the statute in bar of a suit to compel its specific performance.<sup>6</sup>

**§ 565. Notes and Bills.**—“ By the custom of merchants, bills of exchange and promissory notes, and other similar negotiable instruments, must be reduced into writing, and signed by the parties thereto.”<sup>7</sup> But this results equally

<sup>1</sup> *Ante*, § 49; *Currier v. Howard*, 14 Gray, 511, 513; *Allen v. Pancost*, Spencer, 68; *Mitchell v. Mitchell*, 1 Gill, 66; *Sexton v. Fleet*, 2 Hilton, 477; *Galway v. Fullerton*, 2 C. E. Green, 389; *Vose v. Handy*, 2 Greenl. 322; *Littlefield v. Smith*, 17 Maine, 327.

<sup>2</sup> *Ford v. Stuart*, 19 Johns. 342. And see *Brewer v. Franklin Mills*, 42 N. H. 292.

<sup>3</sup> *Dawson v. Coles*, 16 Johns. 51; *Howell v. Bulkley*, 1 Nott & McC. 249, 250; *Becton v. Ferguson*, 22 Ala. 599; *Cotten v. Williams*, 1 Fla. 37; *Morange v. Edwards*, 1 E. D. Smith, 414; *Moore v. Waddle*, 34 Cal. 145.

<sup>4</sup> *Ante*, § 530, 532, 534, 560.

<sup>5</sup> *Ante*, § 506.

<sup>6</sup> The authorities to this plain proposition are less distinct and direct than one might desire, but the reader may consult the following : *Bullion v. Campbell*, 27 Texas, 653; *Newnan v. Carroll*, 3 Yerg. 18; *Currier v. Howard*, 14 Gray, 511; *Robinson v. Williams*, 3 Head, 540; *Richards v. Richards*, 9 Gray, 313; *Finch v. Finch*, 10 Ohio State, 501, 508, 509; *Millard v. Hathaway*, 27 Cal. 119; *Love v. Cobb*, 63 N. C. 324; *Durst v. Swift*, 11 Texas, 273; *Chadsey v. Lewis*, 1 Gilman, 153.

<sup>7</sup> 1 Chit. Con. 11th Am. ed. 91.

also from the necessity of the case. Words are air, and there could be no endorsement written on the back of oral words. Yet we have seen<sup>1</sup> that an oral acceptance of a bill is good.

**§ 566. Other Contracts.**—There are probably, in every one of our States, some other contracts required to be in special forms. But they depend on statutes differing in the different States, or not in constant use, or on statutes of the United States ; not, therefore, within the scope of these pages.

**§ 567. *The Doctrine of this Chapter restated.***

The Statute of Frauds is the only one of constant use, prevailing in all our States, by which special forms have been added to the common-law rules for certain specific sorts of contract. Yet by the common law, in its later period, and irrespective of this statute, a seal is necessary to a conveyance of land, transferring the seisin. *Prima facie*, any contract, by mere oral words, is good. One who claims that a particular contract, other than a conveyance of land, or a bill or note, is not good without writing, must support his claim by showing the statute. And there are instances, not mentioned in the preceding chapters, in which he can do so ; as, in some of our States, an insurance policy is by statute required to be in writing,<sup>2</sup> and perhaps even under seal.<sup>3</sup>

<sup>1</sup> *Ante*, § 53.

<sup>2</sup> *Ante*, § 50.

<sup>3</sup> *Lindauer v. Delaware Ins. Co.*, 13 Ark. 461.

## CHAPTER XXIX.

## CONTRACTS AS AFFECTED BY PARTICULAR AND GENERAL CUSTOM AND USAGE.

§ 568. **Law as Part of Contract.**—The law is deemed to be a part of every contract.<sup>1</sup> Thus,—

§ 569. **Partnership.**—If parties enter into a contract which the court construes to be a partnership, the law of partnership is resorted to by the judge on questions not settled by its terms.<sup>2</sup>

§ 570. **Custom and Usage as Law.**—The common law is to a large extent made up of usage ripened into custom.<sup>3</sup> In the English books, particularly the older ones, there are distinctions between “usage,” “custom,” and “prescription,” not necessary to be considered in this connection.<sup>4</sup> But, in our States, whenever custom has become universal through the State, and from its long standing is presumed to be known by all,—if it is reasonable, and not repugnant to any rule of law,<sup>5</sup>—the courts take judicial cognizance of it, though in the first instance it may or may not have been shown in evidence; for, said Caton, C. J., they “will not pretend to be more ignorant than the rest of mankind.”<sup>6</sup>

<sup>1</sup> Webster *v.* Rees, 23 Iowa, 269; Clark *v.* Pinney, 7 Cow. 681; Rogers *v.* Allen, 47 N. H. 529; The State *v.* Allis, 18 Ark. 269.

<sup>2</sup> Ludlow *v.* Cooper, 4 Ohio State, 1; Livingston *v.* Cox, 6 Barr, 360; Kramer *v.* Arthurs, 7 Barr, 165; Honore *v.* Colmesnil, 1 J. J. Mar. 506; Allen *v.* Davis, 18 Ark. 28.

<sup>3</sup> 1 Bl. Com. 68.

<sup>4</sup> And see Lowry *v.* Read, 3 Brews. 452.

<sup>5</sup> See post, § 571.

<sup>6</sup> Munn *v.* Burch, 25 Ill. 35, 38.

The custom is then accepted as a part of the general law of the State; and, in ordinary legal language, is no more known by the name custom. It is simply law.<sup>1</sup> But—

**§ 571. Custom and Usage proper.**—The terms “custom” and “usage” are commonly applied where the thing signified by them has not ripened or expanded into general law. If it pertains to a particular city or neighborhood only, and is general there, it is law in such locality; yet the courts do not take judicial notice of it, therefore it must be proved.<sup>2</sup> And whatever its nature,—whether it is local to some place, or relates to a special trade or business, and whether it be deemed law or not, it being duly shown to the court,—the rule is, that,—

**§ 572. Effect on Contract.**—If, when and where the contract is made, the custom or usage is known to both the parties, either in fact or presumptively from its notorious character,—if it is of a sort applicable to the contract,—if it is legal, as not conflicting with the law or its policy, and is reasonable and uniform,—it will be accepted, like the general law, not in contradiction of written stipulations, but as explaining what is indistinct in them, and furnishing the rule where they are silent.<sup>3</sup> Some illustrations of this doctrine will appear in the next chapter.

<sup>1</sup> Bishop First Book, § 54, 55; *Columbia Bank v. Fitzhugh*, 1 Har. & G. 289; *Branch v. Burnley*, 1 Call, 147, 159; *Cook v. Renick*, 19 Ill. 598. See *Watt v. Hoch*, 1 Casey, Pa. 411; *Commonwealth v. Mayloy*, 7 Smith, Pa. 291.

<sup>2</sup> *1 Saund. Pl. & Ev. 3d Am. ed.* 399; *Scales v. Key*, 11 A. & E. 819; *Griffin v. Blandford*, Cowp. 62; *Parkin v. Radcliffe*, 1 B. & P. 282; *Winton v. Wilks*, 2 Ld. Raym. 1129, 1134, 1135; *Kingsmill v. Bull*, 9 East, 185; *Leuckart v. Cooper*, 7 Car. & P. 119. But see *Watt v. Hoch*, 1 Casey, Pa. 411.

<sup>3</sup> *Macomber v. Parker*, 18 Pick. 175, 182; *Columbia Bank v. Fitzhugh*, 1 Har. & G. 289; *Walsh v. Mississippi Valley Transp. Co.*, 52 Misso. 434; *Southwestern Freight, etc., Co. v. Stanard*, 44 Misso. 71; *Cheney v. Goodrich*, 106 Mass. 566; *Haskins v. Warren*, 115 Mass. 514; *Mears v. Waples*, 4 Houston, 62; *Butterworth v. Volkening*, 4 Thomp. & C. 650; *McMasters v. Pennsylvania Railroad*, 19 Smith, Pa. 374; *Appleman v. Fisher*, 34 Md. 540; *Luce v. Dorchester Mutual Fire Ins. Co.*, 105 Mass. 297; *Sullivan v. Thompson*, 99 Mass. 259; *Boardman v. Spooner*, 18 Allen, 353; *Eaton v. Smith*, 20 Pick. 150, 156;

*§ 573. The Doctrine of this Chapter restated.*

Law is the atmosphere of life in communities, without which they cannot exist. It surrounds and pervades the whole social fabric. And it furnishes the rule for all transactions. But when parties wish to be governed by a different or additional rule, or to render the law's rule distinct and certain, they enter into a contract. By express stipulations, and within certain restrictions, they may thus vary or give shape to the rule of the law. But still, on points where they are silent, the law remains and furnishes the rule; and, where they speak, it qualifies, contracts, and expands their language by interpretation. And they are presumed to mean that this consequence shall follow their express agreement. But a usage or custom is a law local to a particular place or business. Hence, in forming a contract, the parties become by implication bound by it, the same as by the general law. Yet no custom, usage, or other law will bind them in opposition to an express stipulation of a sort which the courts hold to be valid. Should the law allow this, it would contradict itself.

Hursh *v.* North, 4 Wright, Pa. 241; Thomas *v.* Graves, 1 Mill, 308; Dixon *v.* Dunham, 14 Ill. 324; Leach *v.* Beardslee, 22 Conn. 404; Shaw *v.* Mitchell, 2 Met. 65; Cooper *v.* Kane, 19 Wend. 386; Holford *v.* Adams, 2 Duer, 471; Dodd *v.* Farlow, 11 Allen, 426; Tremble *v.* Crowell, 17 Mich. 493; Strong *v.* Grand Trunk Railroad, 15 Mich. 206; Hinton *v.* Locke, 5 Hill, N. Y. 437; Jordan *v.* Meredith, 3 Yeates, 318; Alabama, etc., Railroad *v.* Kidd, 29 Ala. 221; Burton *v.* Blin, 23 Vt. 151; Chapman *v.* Devereux, 32 Vt. 616; Knox *v.* Artman, 3 Rich. 288; Holmes *v.* Johnson, 6 Wright, Pa. 159; Greene *v.* Tyler, 3 Wright, Pa. 361; Cadwell *v.* Meek, 17 Ill. 220; Renner *v.* Columbia Bank, 9 Wheat. 581; Perkins *v.* Jordan, 35 Maine, 23; Van Ness *v.* Pacard, 2 Pet. 137, 148; Gordon *v.* Little, 8 S. & R. 533; Lee *v.* Kilburn, 3 Gray, 594; Soutier *v.* Kellerman, 18 Misso. 509; Munn *v.* Burch, 25 Ill. 35; Power *v.* Kane, 5 Wis. 265; Rindskoff *v.* Barrett, 14 Iowa, 101; Sanderson *v.* Columbia Ins. Co., 2 Cranch C. C. 218.

## CHAPTER XXX.

## THE INTERPRETATION OF THE CONTRACT.

- § 574. Introduction.
- 575-602. Rules to determine the Meaning.
- 603-608. Rules to determine the Effect.
- 609. Doctrine of the Chapter restated.

**§ 574. Scope of this Chapter—How divided.**—The interpretation of a contract is the ascertaining, not only of its verbal meaning, but also of its legal effect. We shall, therefore, consider, I. Rules to determine the Meaning of a Written Contract; II. Rules to determine the Effect of a Contract, whether written or oral.

**I. Rules to determine the Meaning of a Written Contract.**

**§ 575. Intent of Parties.**—The leading rule is, that a written contract shall be so interpreted as, if possible, to carry out what the parties meant.<sup>1</sup> And interpretation is to be resorted to only when the intent is doubtful.<sup>2</sup> Hence,—

**§ 576. Evidence of Surroundings, etc.**—Though the writing cannot be orally contradicted,<sup>3</sup> except when it is to be reformed in equity as not expressing what both the

<sup>1</sup> *Collins v. Lavelle*, 44 Vt. 230; *Browning v. Wright*, 2 B. & P. 13, 26; *Hunter v. Miller*, 6 B. Monr. 612; *Wolfe v. Scarborough*, 2 Ohio State, 361; *Higgins v. Wasgatt*, 34 Maine, 305.

<sup>2</sup> *Noyes v. Nichols*, 28 Vt. 159; *Means v. Presbyterian Church*, 3 Watts & S. 303.

<sup>3</sup> *Ante*, § 58; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Griswold v. Scott*, 13 Ga. 210; *Clark v. Lillie*, 39 Vt. 405.

parties intended, or under equitable rules is to be treated as thus reformed,<sup>1</sup> yet the parties' surroundings, their relations to each other, and the like, may be shown as helps to the understanding of their written stipulations.<sup>2</sup> And —

**§ 577. All the Writing — Other Writings.** — The entire written instrument, whether upon one piece of paper or on detached pieces referring to one another, and whether constituting one contract or several contracts on one subject, executed simultaneously,<sup>3</sup> or even sometimes when executed on different days, should be looked at in interpreting each particular part.<sup>4</sup> And —

**§ 578. Inaccuracies.** — No inaccuracy of language, whether from false grammar, from employing a word in a wrong meaning, omitting a word or even a clause plainly meant to be inserted, inserting a word not meant, using the wrong word, or otherwise, will be permitted to defeat the intent, where it can thus be distinctly ascertained.<sup>5</sup> Yet,

<sup>1</sup> *Ante*, § 150; *Greenl. Ev.* § 296 *a*.

<sup>2</sup> *1 Greenl. Ev.* § 297; *Add. Con.* 7th Lond. ed. 164; *Maryland v. Railroad*, 22 *Wal.* 105; *Dodge v. Gardiner*, 31 *N. Y.* 239; *Pollard v. Maddox*, 28 *Ala.* 321; *Sumner v. Williams*, 8 *Mass.* 162, 214; *Price v. Evans*, 26 *Miss.* 30; *Codman v. Johnson*, 104 *Mass.* 491; *Masters v. Freeman*, 17 *Ohio State*, 323; *Hutchins v. Hebbard*, 34 *N. Y.* 24; *Webster v. Blount*, 39 *Miss.* 500; *Salisbury v. Andrews*, 19 *Pick.* 250, 253; *Knight v. New England Worsted Co.*, 2 *Cush.* 271; *Farmers' Loan, etc., Co. v. Commercial Bank*, 15 *Wis.* 424; *Williamson v. McClure*, 1 *Wright, Pa.* 402; *Tracy v. Chicago*, 24 *Ill.* 500.

<sup>3</sup> *Ante*, § 59-61.

<sup>4</sup> *Collins v. Lavelle*, 44 *Vt.* 230; *Northumberland v. Errington*, 5 *T. R.* 522, 526; *Hesse v. Stevenson*, 3 *B. & P.* 565; *Wildman v. Taylor*, 4 *Ben.* 42; *New Hampshire Bank v. Willard*, 10 *N. H.* 210; *Thomas v. Austin*, 4 *Barb.* 265; *Holmes v. Martin*, 10 *Ga.* 503; *Stover v. Metzgar*, 1 *Watts & S.* 269; *Whitehurst v. Boyd*, 8 *Ala.* 375; *Casey v. Holmes*, 10 *Ala.* 776; *Stacey v. Randall*, 17 *Ill.* 467; *Makepeace v. Harvard College*, 10 *Pick.* 298, 302; *Hunt v. Frost*, 4 *Cush.* 54; *Craig v. Wells*, 1 *Kernan*, 315; *Berry v. Wisdom*, 3 *Ohio State*, 241; *Dibol v. Minott*, 9 *Iowa*, 408; *Berryman v. Hewit*, 6 *J. J. Mar.* 462; *Payler v. Homersham*, 4 *M. & S.* 423, 426; *Morss v. Salisbury*, 48 *N. Y.* 636.

<sup>5</sup> *Wilson v. Wilson*, 5 *H. L. Cas.* 40, 66; *Kelley v. Upton*, 5 *Duer*, 336; *Thayer v. Lapham*, 18 *Allen*, 26; *Oliver v. Brown*, 3 *Bur.* 1629, 1634, 1635; *Leach v. Micklem*, 6 *East*, 486; *Stockton v. Turner*, 7 *J. J. Mar.* 192; *De Soto v. Dickson*, 34 *Missis.* 150; *Kincannon v. Carroll*, 9 *Yerg.* 11; *Pannell v. Mill*,

excepting these and other like cases, the general rule is, that —

**§ 579. Every Part and Word.** — Every clause and even every word of a contract should, when possible, have assigned to it some meaning, and a harmonious whole be made to appear; for so the parties plainly intended, nor especially would they wilfully insert in their contract a mere idle provision.<sup>1</sup> But, —

**§ 580. Repugnant.** — After efforts at interpretation have failed, what is still found repugnant to the rest may be rejected as surplusage.<sup>2</sup> Or, —

**§ 581. Void for Uncertainty.** — If the meaning of the parties cannot be ascertained from the interpreted writing, — and the case is not one of a latent ambiguity, which, being created by oral testimony, may be orally explained,<sup>3</sup> — the contract will be void for uncertainty.<sup>4</sup>

3 C. B. 625, 638; *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249; *Fowle v. Bigelow*, 10 Mass. 379, 383; *Saunders v. Hanes*, 44 N. Y. 353; *Caldwell v. Layton*, 44 Misso. 220; *Atlanta and West Point Railroad v. Speer*, 32 Ga. 550; *Morey v. Homan*, 10 Vt. 565; *Bennehan v. Webb*, 6 Ire. 57; *Iredell v. Barbee*, 9 Ire. 250; *Whitsett v. Womack*, 8 Ala. 466.

<sup>1</sup> *Shelley's Case*, 1 Co. 93 *a*, 95 *b*; *Heywood v. Heywood*, 42 Maine, 229; *Baron v. Placide*, 7 La. An. 229; *Metcalf v. Taylor*, 36 Maine, 28; *Hydeville Co. v. Eagle Railroad and Slate Co.*, 44 Vt. 395; *Churchill v. Reamer*, 8 Bush, 256, 260; *Randel v. Chesapeake and Delaware Canal*, 1 Harring. Del. 151; *Buck v. Watkins*, 14 Beav. 425; *Corbin v. Healy*, 20 Pick. 514; *Herrick v. Hopkins*, 23 Maine, 217.

<sup>2</sup> *Lambe v. Reaston*, 5 Taunt. 207; *Cooley v. Warren*, 53 Misso. 166; *She-walter v. Pirner*, 55 Misso. 218; *Wells v. Wright*, 2 Mod. 285; *Phillips v. Porter*, 3 Pike, 18; *Eldridge v. See Yup Co.*, 17 Cal. 44; *Gibson v. Bogy*, 28 Misso. 478; *Emerson v. White*, 9 Fost. N. H. 482.

<sup>3</sup> 1 *Greenl. Ev.* § 297; *Cubberly v. Cubberly*, 7 Halst. 308; *McCullough v. Wainright*, 2 *Harris*, Pa. 171; *Hiscocks v. Hiscocks*, 5 M. & W. 363, 368; *Clark v. Powers*, 45 Ill. 283; *Leonard v. Carter*, 16 Wis. 609; *Murray v. Blackledge*, 71 N. C. 492; *Bulkeley v. Wilford*, 2 Car. & P. 173, 8 D. & R. 549.

<sup>4</sup> *Garnett v. Garnett*, 7 T. B. Monr. 545; *Grand Gulf Railroad and Banking Co. v. Bryan*, 8 Sm. & M. 234; *Winslow v. Winslow*, 52 Ind. 8; *Church, etc., Soc. v. Hatch*, 48 N. H. 393; *Klein Peter v. Harrigan*, 21 La. An. 196; *Tolhurst v. Brickinden*, Cro. Jac. 250; *Webster v. Ela*, 5 N. H. 540; *Price v. Griffith*, 15 Jur. 1093; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313; *ante*, § 22.

**§ 582. Uphold the Transaction.** — It follows from the foregoing views, that, if possible, the contract must be so construed as to render it operative, and effectual to carry out the purpose of the parties, instead of being void.<sup>1</sup> Thus, —

**§ 583. Lawful.** — If the terms admit of two meanings, or of having effect in two ways, by one of which the thing would be unlawful and by the other lawful, the latter construction must be adopted.<sup>2</sup> For illustration, —

**§ 584. Statutory Bond.** — If a statutory bond has matter which the statute does not authorize, this will be rejected as surplusage to make it good.<sup>3</sup> And an instrument meant to be a statutory bond, yet void as such for not conforming to the statute,<sup>4</sup> may take effect as a valid bond at the common law.<sup>5</sup> Again, —

**§ 585. Imperfect Deed.** — If an instrument in the form of a deed of land cannot take effect as such for the want of a seal, or from lack of due authority in an agent executing it to affix the seal, or from the nature of the interest which it attempts to convey, or from not being recorded and it is lost, or from any other like cause, it may be construed as an agreement to convey, where there is no obstacle to its going into operation as such agreement.<sup>6</sup>

<sup>1</sup> *Ante*, § 282; *Pray v. Pierce*, 7 Mass. 381, 384; *Marshall v. Fisk*, 6 Mass. 24, 32; *Reilly v. Chouquette*, 18 Misso. 220; *Milbourn v. Simpson*, 2 Wils. 22; *Thrall v. Newell*, 19 Wt. 202; *Anderson v. Baughman*, 7 Mich. 69; *Gano v. Aldridge*, 27 Ind. 294.

<sup>2</sup> *Merrill v. Melchior*, 30 Missis. 516; *Crittenden v. French*, 21 Ill. 598.

<sup>3</sup> *Hall v. Cushing*, 9 Pick. 394, 404; *United States v. \_\_\_\_\_*, 1 Brock. 195; *Dixon v. United States*, 1 Brock. 177; *Walker v. Chapman*, 22 Ala. 116; *Woods v. The State*, 10 Misso. 698; *Shunk v. Miller*, 5 Barr, 250.

<sup>4</sup> *Lawton v. The State*, 5 Texas, 272.

<sup>5</sup> *Lane v. Kasey*, 1 Met. Ky. 410; *Rowlet v. Eubank*, 1 Bush, 477; *Gathwright v. Callaway*, 10 Misso. 663; *Hester v. Keith*, 1 Ala. 316; *Burroughs v. Lowder*, 8 Mass. 373.

<sup>6</sup> *McCaleb v. Pradat*, 25 Missis. 257; *Bayler v. Commonwealth*, 4 Wright, Pa. 37; *Porter v. Read*, 19 Maine, 363; *Blight v. Banks*, 6 T. B. Monr. 192; *Cummings v. Coe*, 10 Cal. 529; *Varick v. Edwards*, Hoffman, 382; *Johnson v. Houghton*, 19 Ind. 359.

§ 586. **The Subject.**—The subject of the contract, and the nature of the transaction, should be considered ; and, in some circumstances, they will influence the interpretation.<sup>1</sup> Thus, —

§ 587. **Words of Inheritance, or not.**—A deed of land will in general convey a fee only when it runs to the grantee and his “heirs;”<sup>2</sup> but it is otherwise with an executory agreement, which may bind the party to convey a fee though the word heirs is not employed.<sup>3</sup>

§ 588. **Reasonable and Just.**—The court will endeavor to give to the contract a construction which shall make it reasonable and just.<sup>4</sup> Hence, —

§ 589. **Mutual Promises —(Dependent or Independent).** Where it consists of mutual promises, the promise on the one side being the consideration for that on the other,<sup>5</sup> the court will incline to the construction which renders them dependent, rather than independent, so that neither party can sue the other unless himself ready to perform ; because the contrary would be neither reasonable nor just.<sup>6</sup> But this rule, like all others, must yield to the real intention of the parties when it is apparent, and to the nature of their agreement.<sup>7</sup>

<sup>1</sup> *Robinson v. Fiske*, 25 Maine, 401; *Higgins v. Wasgatt*, 34 Maine, 305; *Phelps v. Bostwick*, 22 Barb. 314.

<sup>2</sup> *Hogan v. Welcker*, 14 Misso. 177; *Martin v. Long*, 3 Misso. 391.

<sup>3</sup> *Bodley v. Ferguson*, 30 Cal. 511; *Gaule v. Bilyea*, 1 Casey, Pa. 521; *Defraunce v. Brooks*, 8 Watts & S. 67; *Bower v. Cooper*, 2 Hare, 408.

<sup>4</sup> *Halloway v. Lacy*, 4 Humph. 468; *Baron v. Placide*, 7 La. An. 229; *Bickford v. Cooper*, 5 Wright, Pa. 142; *Royalton v. Royalton*, etc., *Turnpike*, 14 Vt. 311.

<sup>5</sup> *Ante*, § 428-431.

<sup>6</sup> *Mecum v. Peoria*, etc., *Railroad*, 21 Ill. 533; *Peques v. Mosby*, 7 Sm. & M. 340; *Liddell v. Sims*, 9 Sm. & M. 596; *Clopton v. Bolton*, 23 Missis. 78.

<sup>7</sup> *Pordage v. Cole*, 1 Saund. Wms. ed. 319 *l*, and the notes; *McCrelish v. Churchman*, 4 Rawle, 26; *Tileston v. Newell*, 13 Mass. 406, 411; *Johnson v. Reed*, 9 Mass. 78; *Howland v. Leach*, 11 Pick. 151, 154; *Gardiner v. Carson*, 15 Mass. 500; *Bean v. Atwater*, 4 Conn. 8; *Todd v. Summers*, 2 Grat. 167; *Evans v. Fegely*, 17 Smith, Pa. 370; *Runkle v. Johnson*, 30 Ill. 328; *Gillum v. Dennis*, 4 Ind. 417; *Sewall v. Wilkins*, 14 Maine, 168; *Hutchings v. Moore*, 4 Met. Ky.

§ 590. **Meaning of the Words.**—The language and terms of the contract will be understood in the ordinary, popular sense;<sup>1</sup> unless they relate to some technical subject,—as, a particular trade or science, the law, or a custom,—in which case their technical meaning will be given them.<sup>2</sup>

§ 591. **Grammatical Construction — Punctuation.**—Nor will the strict grammatical construction, or the punctuation, ever prevail over the evident intent of the parties.<sup>3</sup>

§ 592. **Technical or not.**—Where technical words are proper, still a contract without them is, if plain in meaning, equally valid.<sup>4</sup>

§ 593. **General and specific.**—Words and phrases of wider import are restrained by those of narrower, and the more general by those which are specific and exact, where all cannot stand together in their proper significations, but not where all can; unless the plain intent of the parties requires a different construction.<sup>5</sup> Thus,—

§ 594. **Description of Land conveyed.**—If land in a deed is described by metes and bounds, or by other visible objects, they, being specific and exact, will restrain and

110; *Kettle v. Harvey*, 21 Vt. 301; *Booth v. Tyson*, 15 Vt. 515; *Stansbury v. Fringer*, 11 Gill & J. 149.

<sup>1</sup> *Hawes v. Smith*, 3 Fairf. 429; *Mansfield*, etc., *Railroad v. Veeder*, 17 Ohio, 385.

<sup>2</sup> *Findley v. Findley*, 11 Grat. 434; *Rindskoff v. Barrett*, 14 Iowa, 101; *Rogers v. Danforth*, 1 Stock. 289; *McAvoy v. Long*, 13 Ill. 147; *Wayne v. The General Pike*, 16 Ohio, 421; *Eaton v. Smith*, 20 Pick. 150; *Ellmaker v. Ellmaker*, 4 Watts, 89; *Robinson v. Fiske*, 25 Maine, 401.

<sup>3</sup> *Morey v. Homan*, 10 Vt. 565; *Nettleton v. Billings*, 13 N. H. 446; *English v. McNair*, 34 Ala. 40; *White v. Smith*, 9 *Casey*, Pa. 186; *Ewing v. Burnet*, 11 Pet. 41; *Reeves v. Topping*, 1 Wend. 388; *Hancock v. Watson*, 18 Cal. 137.

<sup>4</sup> *Barney v. Worthington*, 37 N. Y. 112; *Chesapeake*, etc., *Canal v. Baltimore*, etc., *Railroad*, 4 Gill & J. 1; *Lovering v. Lovering*, 13 N. H. 513; *Polhemus v. Heiman*, 45 Cal. 573.

<sup>5</sup> *Browning v. Wright*, 2 B. P. 13; *Hesse v. Stevenson*, 3 B. & P. 565; *Barton v. Fitzgerald*, 15 East, 530; *Holmes v. Martin*, 10 Ga. 503; *Heywood v. Heywood*, 42 Maine, 229; *Field v. Huston*, 21 Maine, 69; *Moore v. Griffin*, 22 Maine, 360; *Huntington v. Havens*, 5 Johns. Ch. 23; *Herrick v. Hopkins*, 23 Maine, 217.

control all words of general description.<sup>1</sup> Yet even this rule may perhaps yield to others in a particular instance; for no one rule is universally supreme over all.<sup>2</sup> And—

**§ 595. General after Particular.**—A sweeping clause, following a specific enumeration, will generally be restricted by interpretation to things of a like sort with those enumerated.<sup>3</sup>

**§ 596. Derogation of Law.**—Terms in a contract in derogation of law—that is, establishing for the particular instance a rule contrary to what the law would provide—are construed strictly.<sup>4</sup> For instance,—

**§ 597. Limiting Carrier's Liability.**—It is so when a common carrier undertakes to limit his liability by a special agreement with the party; he can claim nothing beyond what is plainly within the words.<sup>5</sup>

**§ 598. Parties' Interpretation.**—In a doubtful case, the interpretation which the parties themselves have, by their conduct, practically given their contract, will prevail.<sup>6</sup>

**§ 599. Written and Printed.**—If the contract is made from a printed blank, the printed matter is as much a part

<sup>1</sup> *Emery v. Fowler*, 38 Maine, 99; *Bosworth v. Sturtevant*, 2 *Cush.* 392; *Dawes v. Prentice*, 16 *Pick.* 435; *Butler v. Widger*, 7 *Cow.* 723; *Whiting v. Dewey*, 15 *Pick.* 428; *Dalton v. Rust*, 22 *Texas*, 133; *Richardson v. Chicker- ing*, 41 *N. H.* 380; *Blasdell v. Bissell*, 6 *Barr.* 258.

<sup>2</sup> *Hamilton v. Foster*, 45 *Maine*, 32; *Sawyer v. Kendall*, 10 *Cush.* 241, 246; *Bradford v. Pitts*, 2 *Mill.* 115.

<sup>3</sup> *Anonymous*, 398; *Pollock Con.* 409, referring to *Rooke v. Kensington*, 2 *Kay & J.* 753, 771; and *Bulkley v. Wilford*, 8 *D. & R.* 549.

<sup>4</sup> *Dufief v. Boykin*, 9 *La. An.* 295; *Delaware, etc., Tow-boat Co. v. Starrs*, 19 *Smith, Pa.* 36.

<sup>5</sup> *Menzell v. Railway*, 1 *Dillon*, 581; *Baltimore, etc., Railroad v. Brady*, 32 *Md.* 333; *Lamb v. Camden, etc., Railway*, 46 *N. Y.* 271; *The City of Norwich*, 4 *Ben.* 271.

<sup>6</sup> *French v. Pearce*, 8 *Conn.* 489; *Jakeway v. Barrett*, 38 *Vt.* 816; *Chicago v. Sheldon*, 9 *Wal.* 50, 54; *Farrar v. Rowly*, 2 *La. An.* 475; *D'Aquin v. Barbour*, 4 *La. An.* 441; *Casey v. Pennoyer*, 6 *L. An.* 776; *Coleman v. Grubb*, 11 *Harris, Pa.* 393. See *Dunn v. Mobile Bank*, 2 *Ala.* 152; *Hutchings v. Dixon*, 11 *Md.* 29.

of it as the written ;<sup>1</sup> still, where printed and written words conflict, the latter will prevail.<sup>2</sup>

§ 600. **Grantor's Words.**—Another rule, not of much importance, but resorted to when all other means of interpretation fail,<sup>3</sup> is, that, in a deed-poll, or other writing of the like sort, the words shall be taken in their strict sense against the grantor, or him who employs them, and liberally in favor of the other party.<sup>4</sup> This rule is, by perhaps the better authorities, not applicable to indentures and simple contracts in like form ; “because,” in them, “the law makes each party privy to the speech of the other.”<sup>5</sup> But, by other authorities, the rule seems to be applicable equally to them.<sup>6</sup>

§ 601. **Made certain.**—In all cases the maxim applies, that what can be made certain is certain ; as, though a deed to the “heirs” of a living person is void, because there can be no heirs until the ancestor dies ;<sup>7</sup> yet a deed may be valid to the heirs of a person deceased, for now there are heirs, and, though not named, they can be ascertained.<sup>8</sup> So a conveyance to a living person’s “children” is good, if, on enquiry, such person is ascertained to have children.<sup>9</sup> Another universal rule is, that, —

§ 602. **Know the Law.**—In the interpretation of every contract, the parties are conclusively presumed to know the

<sup>1</sup> *Wallwork v. Derby*, 40 Ill. 527.

<sup>2</sup> *Hernandez v. Sun Mutual Ins. Co.*, 6 Blatch. 317; *American Express Co. v. Pinckney*, 29 Ill. 392; *Howard Fire Ins. Co. v. Bruner*, 11 Harris, Pa. 50.

<sup>3</sup> *Falley v. Giles*, 29 Ind. 114.

<sup>4</sup> *Green's Case*, 1 Leon. 218; *Drinkwater v. London Assurance Co.*, 2 Wils. 368; *Beeson v. Patterson*, 12 Casey, Pa. 24; *Bennehan v. Webb*, 6 Ire. 57; *Wells v. Pacific Ins. Co.*, 44 Cal. 397; *Aurora, etc., Ins. Co. v. Eddy*, 49 Ill. 106; *Winslow v. Patten*, 34 Maine, 25; *Salisbury v. Andrews*, 19 Pick. 250, 258.

<sup>5</sup> *Staunford and Walsh in Browning v. Beston*, 1 Plow. 131, 134; *Say's Case*, 10 Mod. 40, 47; *Met. Con.* 312.

<sup>6</sup> 1 Chit. Con. 11th Am. ed. 136; *Browning v. Wright*, 2 B. & P. 13, 22.

<sup>7</sup> *Winslow v. Winslow*, 52 Ind. 8.

<sup>8</sup> *Shaw v. Loud*, 12 Mass. 447; *Boone v. Moore*, 14 Misso. 420.

<sup>9</sup> *Hamilton v. Pitcher*, 58 Misso. 384. And see *Adams v. King*, 16 Ill. 169.

law, and a construction based on the assumption of their ignorance of it, or of the effect of their language, is never permitted.<sup>1</sup> They are bound by whatever terms they voluntarily employ.<sup>2</sup>

## II. *Rules to determine the Effect of a Contract.*

**§ 603. Governed by Law, Custom, Usage.**—The most important proposition under this head appears in the elucidations of the last chapter; namely, that an express contract merely qualifies, alters, or affirms the law, custom, or usage otherwise governing the parties, or brings them within the same, which still remains their rule of action and responsibility in all other respects.<sup>3</sup> Thus,—

**§ 604. Promissory Note.**—If one executes a promissory note, he brings himself within the law-merchant governing this species of contract: as, for example, he may be required to pay it to any person to whom it is lawfully transferred,<sup>4</sup> and he is entitled to the customary days of grace.<sup>5</sup> But,—

**§ 605. Common Carrier.**—If a common carrier, in words corresponding to those which constitute a promissory note, undertakes to deliver to the order of another a package of merchandise which he receives, he incurs a different sort of liability. No days of grace are allowed him, but the work must be promptly done;<sup>6</sup> and any right of action against him is, not in one to whom his promise has been assigned, but in the consignor, or consignee, or person acting for the

<sup>1</sup> Boner *v.* Mahle, 3 La. An. 600.

<sup>2</sup> Strohecker *v.* Farmers' Bank, 6 Barr, 41; Holmes *v.* Hall, 8 Mich. 66; Furbush *v.* Goodwin, 5 Fost. N. H. 425.

<sup>3</sup> *Ante*, § 568, 570-572, 596.

<sup>4</sup> Fleckner *v.* United States Bank, 8 Wheat. 338; Guild *v.* Eager, 17 Mass. 615; Harlow *v.* Boswell, 15 Ill. 56; Holeman *v.* Hobson, 8 Humph. 127.

<sup>5</sup> Craft *v.* State Bank, 7 Ind. 219; Wood *v.* Corl, 4 Met. 203.

<sup>6</sup> Scovill *v.* Griffith, 2 Kern. 509, 515; Price *v.* Hartshorn, 44 Barb. 655; Smith *v.* Whitman, 13 Misso. 352; Nettles *v.* South Carolina Railroad, 7 Rich. 190; Cleveland, etc., Railroad *v.* Perkins, 17 Mich. 296; Philleo *v.* Sanford, 17 Texas, 227.

one or the other, as determined by the principles governing ordinary contracts.<sup>1</sup> His obligations are fixed by the law applicable to him.<sup>2</sup> For example, he is the insurer of the goods in his care against fire, robbery, other thefts, and all casualties short of those which proceed from the act of God or the public enemy, as will be explained further on,<sup>3</sup> though not a word on the subject has passed between him and the owner.<sup>4</sup> In like manner,—

§ 606. **Insurance.**—An insurance policy, especially of marine insurance, is but an imperfect guide to the real contract between the insurer and the insured. Very much depends on usage and special rules of law.<sup>5</sup> And,—

§ 607. **In General.**—In carrying into effect every sort of contract, the courts, after determining its meaning, are compelled to consider also and be guided by such lawful usages and customs as are shown in connection with it, and the law applicable to the particular case. In few instances, if any, do the mere interpreted words furnish the sole rule. Hence,—

§ 608. **Implied.**—In all contracts, there is something implied, as well as something expressed. But this matter has already been considered.<sup>6</sup>

### § 609. *The Doctrines of this Chapter restated.*

In language, written or spoken, various meanings and shades of meaning are given to words, to be determined by

<sup>1</sup> *Sanford v. Housatonic Railroad*, 11 CUSH. 155; *Price v. Powell*, 3 CONST. 322; *Stimpson v. Gilchrist*, 1 GREENL. 202; *D'Anjou v. Deagle*, 3 HAR. & J. 206; *Elkins v. Boston, etc., Railroad*, 19 N. H. 337; *Green v. Clark*, 13 Barb. 57.

<sup>2</sup> *Thurman v. Wells*, 18 Barb. 500; *Hooper v. Wells*, 27 CAL. 11.

<sup>3</sup> *Post*, § 612, 614.

<sup>4</sup> 2 KENT COM. 597; *Graff v. Bloomer*, 9 BARR. 114; *Klauber v. American Express*, 21 WIS. 21; *Joyce v. Kennard*, Law Rep. 7 Q. B. 78.

<sup>5</sup> See, for example, *Rankin v. Potter*, Law Rep. 6 H. L. 83, 101, 110, 155; *Parkhurst v. Gloucester Mutual Fishing Ins. Co.*, 100 Mass. 301.

<sup>6</sup> *Ante*, § 67-106, 345-351.

their connection with other words, by the place they occupy in the sentence, by the subject under discussion, and by some other minor considerations. And, if this were not allowable, even Infinite Wisdom could not construct any language sufficiently voluminous, yet comprehensible by men, to serve as a vehicle for their ever-changing and still progressing thoughts. It is by taking advantage of these varying meanings, effected by unlimited diversities of combination, that we are able to convey new ideas ; and, but for this, no fresh form of thought could be expressed. It is, therefore, neither desirable nor possible that every word should have one only established meaning. In the law, a few words have such meanings, when employed to convey legal ideas ; but this is not the general rule, even in the law. Now,—

These views will furnish the key to all verbal interpretation of contracts ; it being borne in mind that the object of interpretation is simply to ascertain what the parties meant. The only rule, strictly technical, governing this subject is, that, when the contract is in writing, the written words are not to be expanded or qualified by any oral expressions, but the intent of the parties is to be drawn from them alone, examined in connection with the surroundings, the subject, and the laws of the language. Some rules, as the reader has seen, have been established in subordination to this rule, and in aid of it ; but they are not carried to the extent of subverting what, the court can discern, the parties really meant.

The legal effect of an interpreted contract will depend on the particular laws and customs governing the subject to which it relates.

## CHAPTER XXXI.

## IMPOSSIBILITIES CONNECTED WITH THE CONTRACT.

§ 610. **Authorities and Dicta.**—On the subject of this chapter, the adjudications are at some points in discord, quite beyond the possibility of reconciliation. And not unfrequently there is a want of harmony between the language of judges and their actual decisions, of which they appear to be themselves unconscious. It would not comport with the plan of this work to discuss these differences at length; hence the only practical method will be to lay down such leading doctrines as are best sustained by the combined force of authority and principle.

§ 611. **Impossibility known when Contract made.**—If parties agree to do an impossible thing, knowing it to be such, this is a vain and idle act, destitute of the essential elements of a contract. And though it is perhaps not to be deemed void as contrary to law,<sup>1</sup> which it does not seem strictly to be, yet to take jurisdiction of it would be beneath the dignity of any court.<sup>2</sup> Therefore the doctrine of the common law always has been, and still is, that every such contract is void.<sup>3</sup> But, —

§ 612. **Nature of the Impossibility.**—Between the impossibility here and elsewhere in this chapter spoken of,

<sup>1</sup> *Ante*, § 458, 465, 466.

<sup>2</sup> Compare with *ante*, § 489.

<sup>3</sup> 1 *Britton*, *Nich. ed.* 158, 239; *Nerot v. Wallace*, 8 *T. R.* 17, 22; *Met. Con.* 211; 1 *Chit. Con.* 11th *Am. ed.* 64; 2 *Ib.* 1073. See *Gilmer v. Gilmer*, 42 *Ala.* 9.

and an inconvenience, there is a wide distinction ; for a man may bind himself to what it is inconvenient for him to do, or even to what may prove to be beyond his capacity.<sup>1</sup> The impossibility must be such, and such only, as, in the language of the books, proceeds from “the act of God or the king’s enemies.”<sup>2</sup> The meaning of this is, some manifestation of nature to which man has not contributed and which he cannot overcome, such as lightning and the fire it kindles or a tempest, but not a fire from an ordinary accident,<sup>3</sup> or, the ravages or restraints of war, but not of a robber or a mob.<sup>4</sup> We shall see further illustrations of the distinction as we proceed.

**§ 613. Legal Duty becoming Impossible.** — If one is under a duty created by law, and then the doing of the thing becomes in the sense just explained impossible, he is excused ;<sup>5</sup> for no man can be required to contend successfully with the Almighty, or in his private capacity to overcome

<sup>1</sup> Butler’s note to *Co. Lit.* 206 *a*; *Dermott v. Jones*, 2 *Wal.* 1; *Reid v. Edwards*, 7 *Port.* 508; *The Harriman*, 9 *Wal.* 161; *Stone v. Dennis*, 3 *Port.* 231.

<sup>2</sup> *Jones Bailm.* Am. ed. of 1807, p. 120.

<sup>3</sup> *Nichols v. Marsland*, *Law Rep.* 10 *Ex.* 255; *Chicago, etc., Railroad v. Sawyer*, 69 *Ill.* 285; *Price v. Hartshorn*, 44 *N. Y.* 94; *Forward v. Pittard*, 1 *T. R.* 27; *Brousseau v. Hudson*, 11 *La. An.* 427; *Alsept v. Eyles*, 2 *H. Bl.* 108, 113; *Trent Navigation v. Wood*, 3 *Esp.* 127; *Rex v. Somerset*, 8 *T. R.* 312; *Amies v. Stevens*, 1 *Stra.* 128; *Bird v. Astcock*, 2 *Bulst.* 280; *Mouse’s Case*, 12 *Co.* 63. “The books generally mention a promise to go from London to Rome in three hours, as a promise that would be void because impossible to be performed.” *Met. Con.* 214. The impediment in this case, the reader perceives, is an “act of God,” within our definition; it is inherent in the nature which God has given to man, rendering such rapidity of locomotion impossible to any one; or, in the language of our definition, it is a “manifestation of nature to which man has not contributed, and which he cannot overcome.”

<sup>4</sup> *Forward v. Pittard*, *supra*, at p. 34; *Elliott v. Norfolk*, 4 *T. R.* 789; *Trent Navigation v. Wood*, *supra*; *Gordon v. Rimmington*, 1 *Camp.* 123; *Sugarman v. The State*, 28 *Ark.* 142.

<sup>5</sup> *Mosely v. Baker*, 2 *Sneed*, *Tenn.* 362; *Rex v. Somerset*, 8 *T. R.* 312; *Nichols v. Marsland*, *Law Rep.* 10 *Ex.* 255; *Cassady v. Clarke*, 2 *Eng.* 123; *Rylands v. Fletcher*, *Law Rep.* 3 *H. L.* 330, 340, 342.

the public enemy. All the authorities affirm this. For example, —

§ 614. **Common Carrier.** — The law, by implication from the contract of a common carrier, casts upon him the duty to carry the goods safely. If they are destroyed by fire, he is responsible.<sup>1</sup> But if their destruction is caused by the act of God or of a public enemy, and he is himself using due diligence to preserve them and carry them in safety,<sup>2</sup> he is excused,<sup>3</sup> while no obstacles short of these will suffice.<sup>4</sup> On the other hand, —

§ 615. **Performance of Express Contract Impossible.** — The books contain numerous *dicta* of judges and text writers to the effect, that, though the act of God or of a public enemy will justify the non-performance of a duty created by law, or implied from a contract, it will furnish no excuse for not fulfilling the terms of an express stipulation.<sup>5</sup> But not many of the cases sustain this distinction in actual adjudication, however they may, in *dicta*, though doubtless some do. Thus, —

§ 616. **Destroyed by Fire.** — On the strength of this assumed distinction, it has been held, that, if one promises to build a house on land of another; and, before the house is completed, it is consumed by fire; he is not therefore released from his contract.<sup>6</sup> And plainly this result is so, yet plainly this reasoning is unsound; because the fire is the act neither of God nor of the public enemy,<sup>7</sup> and, if it

<sup>1</sup> *Ante*, § 605; *Forward v. Pittard*, 1 T. R. 27.

<sup>2</sup> *Holladay v. Kennard*, 12 Wal. 254.

<sup>3</sup> *Southern Express v. Womack*, 1 Heisk. 256; *Strohn v. Detroit*, etc., Railroad, 23 Wis. 126; *Lewis v. Ludwick*, 6 Coldw. 368; *Wallace v. Sanders*, 42 Ga. 486.

<sup>4</sup> *Illinois Central Railroad v. McClellan*, 54 Ill. 58, 70.

<sup>5</sup> *Cassady v. Clarke*, 2 Eng. 123; *Clancy v. Overman*, 1 Dev. & Bat. 402; *School District v. Dauchy*, 25 Conn. 530.

<sup>6</sup> *Adams v. Nichols*, 19 Pick. 275. See *Boyle v. Agawam Canal*, 22 Pick. 381; *Dermott v. Jones*, 2 Wal. 1.

<sup>7</sup> *Ante*, § 612.

was, still another house would answer the contract equally well, so that the fire did not compel the non-fulfilment of what was agreed. Again,—

§ 617. **Lease, etc.**—It is held, that, if a man takes a lease of a house and land, and then he is driven off by the public enemy, or the house is destroyed by the act of God, he is not released from his covenant to pay rent.<sup>1</sup> And, for this sound rule of law, there are two excellent reasons: first, the lease creates a vested estate in the realty, and the covenant to pay rent simply specifies by what instalments the consideration is to be given; <sup>2</sup> secondly, the act of God interfered in no manner with paying the money, it did a thing entirely different. Yet,—

§ 618. **Failure of Consideration.**—If the consideration for a promise fails through the act of God, this will discharge the promisor; as, where one agreed to pay a sum for tuition during a specified quarter, but was sick, the court refused to enforce the payment. The sickness, which in law is the act of God, did not prevent the performance of the promisee's part, but it took away the foundation for the promise.<sup>3</sup>

§ 619. **True Doctrine — Performance of Contract Excused.**—The true doctrine of the law, therefore, deducible both from reason and from all but a few of the actual determinations of the courts, is, that the act of God or of a public enemy will excuse the performance of an express contract, the same as all admit that it will of an implied promise or of a duty created by law.<sup>4</sup> Thus,—

<sup>1</sup> 4 Kent Com. 465-467; 1 Chit. Con. 11th Am. ed. 1074.

<sup>2</sup> See, as illustrative, *Calloway v. Hamby*, 65 N. C. 631; *Wilkinson v. Cook*, 44 Missis. 367; *Dowdy v. McLellan*, 52 Ga. 408.

<sup>3</sup> *Stewart v. Loring*, 5 Allen, 806. See *Anglo-Egyptian Nav. Co. v. Rennie*, Law Rep. 10 C. P. 271.

<sup>4</sup> *Morrow v. Campbell*, 7 Port. 41; *The Eliza, Daveis*, D. C. 316; *Miller v. Phillips*, 7 Casey, Pa. 218; *Brown v. Dillahunty*, 4 Sm. & M. 713; *Crawford v. Hamilton*, 3 Madd. 251, 254; *Selden v. Preston*, 11 Bush, 191. See *Ide v. Fassett*, 45 Vt. 68.

§ 620. **Personal Services, Apprenticeship, etc.** — If one stipulates to serve another in person, or to do a thing which cannot be done by proxy, and by the act of God in the form of sickness or death he is prevented from doing it, no action can be maintained against him or his administrator as for a breach of contract.<sup>1</sup> A contract of apprenticeship is a familiar illustration of this.<sup>2</sup> And the death of the master or employer terminates the obligation, the same as of the apprentice or the employed.<sup>3</sup> Again, —

§ 621. **Appearance Bond.** — If one becomes bound for the appearance of an arrested person in court, and before the day the person dies, performance is excused by this act of God.<sup>4</sup> On the other hand, —

§ 622. **By Proxy.** — Where one undertakes to do what can be done by others who may be employed, — as, for example, the carpenter work of a house, — personal inability from sickness does not render the doing impossible, and he is not excused.<sup>5</sup> And it is the same if he dies, where the contract is of a sort which may be carried out by his personal representatives; they must fulfil, or respond in damages.<sup>6</sup> But, —

§ 623. **Sickness deterring Workmen.** — If, at the place where a contract for labor is to be performed, there prevails, during the entire period, a fatal and contagious disease, rendering it imprudent for a man to work there and consequently impossible to procure suitable help, this will discharge the party from the duty to perform. And if, before

<sup>1</sup> *Knight v. Bean*, 22 Maine, 531; *Robinson v. Davison*, Law Rep. 6 Ex. 269; *Stubbs v. Holywell Railway*, Law Rep. 2 Ex. 311; *Poussard v. Spiers*, 1 Q. B. D. 410, 414.

<sup>2</sup> *Boast v. Firth*, Law Rep. 4 C. P. 1. And see *Davenport v. Gentry*, 9 B. Monr. 427.

<sup>3</sup> *Whincup v. Hughes*, Law Rep. 6 C. P. 78; *Farrow v. Wilson*, Law Rep. 4 C. P. 744. See *Martin v. Hunt*, 1 Allen, 418; *Hayes v. Willio*, 4 Daly, 259.

<sup>4</sup> *Scully v. Kirkpatrick*, 29 Smith, Pa. 324.

<sup>5</sup> *Cassady v. Clarke*, 2 Eng. 128.

<sup>6</sup> *Hawkins v. Ball*, 18 B. Monr. 816.

the contagion came, he did a part of the work, he may recover pay for it on a *quantum meruit*.<sup>1</sup>

**§ 624. Assuming Responsibility for the Inevitable.** — Obviously, and within doctrines already stated,<sup>2</sup> an express agreement to pay any damage arising from the act of God or a public enemy is valid. A familiar illustration is a policy of marine insurance, wherein the underwriter promises to compensate the owner in money for damages from "perils of the sea," which are construed to include a tempest.<sup>3</sup> This sort of contract is every day enforced in our courts.<sup>4</sup> The true distinction is, that, —

**§ 625. Distinction.** — If the promise is to do a thing, and then the act of God or the public enemy interposes, rendering the doing, not merely inconvenient, but impossible, the promisor is not compellable to respond in damages. But, if the undertaking is to answer in damages, — or, in the alternative, either to do or to answer in damages,<sup>5</sup> — this may be enforced. In some of the cases, by what would seem to be an oversight, the distinction thus stated has not been observed, and defendants have been compelled to pay money because they could not contend successfully with the Almighty or with the public enemy.<sup>6</sup>

**§ 626. Great Inconvenience.** — Great inconvenience, therefore, is not a valid excuse for non-performance.<sup>7</sup> And, —

<sup>1</sup> *Lakeman v. Pollard*, 43 Maine, 463. And see *Sickles v. United States*, 1 Ct. Cl. 214.

<sup>2</sup> *Ante*, § 616, 617.

<sup>3</sup> *Ante*, § 612.

<sup>4</sup> *Taylor v. Dunbar*, Law Rep. 4 C. P. 206; *Baker v. Manufacturers' Ins. Co.*, 12 Gray, 603; *Fleming v. Marine Ins. Co.*, 4 Whart. 59.

<sup>5</sup> See post, § 478.

<sup>6</sup> See, and compare, *Crawford v. Hamilton*, 3 Madd. 250, 254; *Howell v. Coupland*, 1 Q. B. D. 258; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 3 Thomp. & C. 368; *Bryan v. Spurgin*, 5 Sneed, Tenn. 681; *West v. The Uncle Sam*, 1 McAl. 505; *Jemison v. McDaniel*, 25 Missis. 83; *Hore v. Whitmore*, Cowp. 784.

<sup>7</sup> *Duncan v. Gibson*, 45 Misso. 352; *Lomis v. Ruetter*, 9 Watts, 516; *Huling v. Craig*, Addison, 342; *Anspach v. Bast*, 2 Smith, Pa. 356; *Cobb v. Harmon*, 23 N. Y. 148; *Dodge v. Van Lear*, 5 Cranch C. C. 278.

§ 627. **Substantial Performance.**—If there may be a substantial performance, though not in the exact terms of the contract, this will be required.<sup>1</sup> And where the undertaking is to do one of two things, the impossibility of doing the one does not excuse the doing of the other.<sup>2</sup>

§ 628. **Performance forbidden by Law.**—In a previous chapter,<sup>3</sup> we saw that a contract forbidden by law is void, and something was said of the effect of a statute making performance illegal. And it is within the doctrine of that chapter to add, that, if a contract is lawful when made, but it becomes unlawful afterward,—as, for example, through a new statute,—this is an impossibility which, like the act of God, excuses performance.<sup>4</sup> So —

§ 629. **Prevented by Judicial Process.**—A process from court, interrupting and rendering impossible the doing of the thing, will furnish the like excuse.<sup>5</sup>

§ 630. **Conditions.**—Conditions in contracts are either precedent or subsequent. But whether a condition is the one or the other, if it is impossible, yet not otherwise unlawful, when the contract is made, it, only, is void; and the rest of the contract takes effect, or is enforceable, as though it contained no condition.<sup>6</sup> Yet if a condition precedent is not known to be impossible when the contract is made, and it becomes impossible by the act of God, still the other party cannot be placed in default while the condition remains, even for this cause, unperformed.<sup>7</sup> There

<sup>1</sup> *White v. Mann*, 26 Maine, 361; *Williams v. Vanderbilt*, 28 N. Y. 217; *Chase v. Barrett*, 4 Paige, 148.

<sup>2</sup> *Da Costa v. Davis*, 1 B. & P. 242. See *Erie Railway v. Union Locomotive, etc., Co.*, 6 Vroom, 240.

<sup>3</sup> *Ante*, § 458, 463.

<sup>4</sup> *Brown v. Dillahunty*, 4 Sm. & M. 718; *Brick Presbyterian Church v. New York*, 5 Cow. 538.

<sup>5</sup> *Walker v. Fitts*, 24 Pick. 191, 195; *Lord v. Thomas*, 64 N. Y. 107; *Bain v. Lyle*, 18 Smith, Pa. 60; *Ohio, etc., Railway v. Yohe*, 51 Ind. 181.

<sup>6</sup> *Co. Lit. 206*; *Hughes v. Edwards*, 9 Wheat. 489; *Merrill v. Bell*, 6 Sm. & M. 730. See *Barksdale v. Elam*, 30 Missis. 694.

<sup>7</sup> *Mizell v. Burnett*, 4 Jones, N. C. 249; *Poussard v. Spiers*, 1 Q. B. D. 410;

are some nice and curious questions connected with conditions rendered impossible by matter subsequent, but it is best not to enter into them further here.<sup>1</sup>

§ 631. *The Doctrine of this Chapter restated.*

It is a general principle of our law that no one shall suffer from the inevitable.<sup>2</sup> For example, if a man, without carelessness, lawfully keeps an animal not known to be vicious, he will not be responsible for an injury to the person or property of another done by the animal.<sup>3</sup> On this principle, if a party promises to do a thing, then is prevented from the doing by overwhelming necessity, or by the law having made it unlawful, he will not be compelled to suffer as for a breach of contract. Yet if his undertaking is to pay the damages which may come from a possible necessity not foreseen, this contract may be enforced; for, where a loss will fall on a person should a contingent event happen, it is lawful and just for another person, on receiving a consideration, to undertake to bear the loss.

But there are, both in natural reason and in the law, various degrees of necessity. And, within the present topic, the standard of necessity is what comes from the act of God, the act of a public enemy, or the forbidding of the thing by law.

*Bettini v. Gye*, 1 Q. B. D. 183; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276.

<sup>1</sup> *Co. Lit.* 206; *Irion v. Hume*, 50 Missis. 419, 426; *Bain v. Lyle*, 18 Smith, Pa. 60; *Merrill v. Emery*, 10 Pick. 507; *People v. Manning*, 8 Cow. 297; *Hiland v. Bouldin*, 4 T. B. Monr. 147.

<sup>2</sup> *Australasian Steam Nav. Co. v. Morse*, *Law Rep.* 4 P. C. 222, 228; 1 *Bishop Crim. Law*, § 346, 351; *Terry v. New York*, 8 *Bosw.* 504; *Newton v. Pope*, 1 *Cow.* 109.

<sup>3</sup> *Dearth v. Baker*, 22 *Wis.* 73; *Decker v. Gammon*, 44 *Maine*, 822; *Meredith v. Reed*, 26 *Ind.* 334.

## CHAPTER XXXII.

## THE UNAUTHORIZED ALTERING OF WRITTEN CONTRACTS.

§ 632. **Concerning the Authorities.**—On the subject of this chapter, as on that of the last, the judicial utterances and decisions are to some extent conflicting, and not at all points quite satisfactory. Still, on the whole, the doctrine is plain, and it is rational. It is, in general terms, and keeping in mind the reason of the law, and following the better adjudications where they differ, that,—

§ 633. **The Doctrine.**—If a party to a written contract so alters it, while it remains executory, as to vary its legal effect to his advantage, whether he meditates a fraud or not,—or, if, with the positive intent to defraud, he makes in it any alteration whatever,—or, if another thus alters it under authority from him,—or, if one to whose custody he commits it makes in it a material alteration advantageous to him, though without express authority,—then, at the election of the other party, he is estopped from relying upon it in a court of justice.

§ 634. **Reason of the Doctrine.**—This doctrine rests, in the main, on the technical reason, that it is essential to the protection of honest parties against the frauds of the dishonest.<sup>1</sup> And it has a further support from the consideration, that one should not blow hot and cold at the same time: after he has altered the contract, he cannot in common decency pretend that it remains in its old form; he can

<sup>1</sup> *Master v. Miller*, 4 T. R. 320, 329, 330.

claim nothing of the other party under the new form, because, to this, such party has not consented. Hence—

§ 635. **Election by other Party.**—The rule ought to be, and in judicial reason it is, but hitherto the decisions seem not to have spoken distinctly concerning it, that, after a written contract has been wrongfully altered in the interest of a party, the other party shall have his election to repudiate it, to maintain it in force in its old form, or to accept the altered form; but not, with knowledge of the facts, to do the one as to some of its stipulations and the other as to others.<sup>1</sup> Plainly, on authority as well as reason, he may still rely on the contract as it stood before the alteration, if he will.<sup>2</sup> Hence,—

§ 636. **Voidable.**—Though, in the language, not quite accurate, often employed in the books, the altered contract may be spoken of as void, it is truly voidable, and so it should be termed, within distinctions already explained.<sup>3</sup>

§ 637. **Alteration by Stranger.**—One not a party, a custodian, or otherwise connected with a written contract, does not impair the rights of any party, if, without authority, he alters or destroys it, provided its original contents can be proved.<sup>4</sup> But—

§ 638. **By Custodian.**—The custodian of an instrument stands, in a measure, in the place of him for whose benefit he holds it; rendering an alteration by him, though without specific evidence of authority, in a general way and perhaps indentially, the same as if done by the party's own hand.<sup>5</sup>

<sup>1</sup> See *Pattinson v. Luckley*, Law Rep. 10 Ex. 330.

<sup>2</sup> *Hemming v. Trenery*, 9 A. & E. 926, 934; *United States v. Spalding*, 2 *Mason*, 478; *Cutts v. United States*, 1 *Gallis*, 69.

<sup>3</sup> *Ante*, § 151 et seq.

<sup>4</sup> *Henfree v. Bromley*, 6 *East*, 309, 311; *Piersol v. Grimes*, 30 *Ind.* 129; *Davis v. Carlisle*, 6 *Ala.* 707; *Croft v. White*, 36 *Missis.* 455; *Medlin v. Platte*, 8 *Miss.* 235; *Lubbering v. Kohlbrecher*, 22 *Miss.* 596; *Nichols v. Johnson*, 10 *Conn.* 192; *Bigelow v. Stilphen*, 35 *Vt.* 521; *Terry v. Hazlewood*, 1 *Duvall*, 104; *Rees v. Overbaugh*, 6 *Cow.* 746; *Fullerton v. Sturges*, 4 *Ohio State*, 529.

<sup>5</sup> *Pattinson v. Luckley*, Law Rep. 10 Ex. 330, 333; *Morrison v. Welty*, 18 *Md.* 169. See *Bigelow v. Stilphen*, 35 *Vt.* 521.

**§ 639. By the Party.** — When a party himself alters the written contract, whether acting personally or through an agent whom he thereto authorizes, if his motive is not dishonest, and the alteration is such as does not vary the interpretation to the prejudice of the other party,<sup>1</sup> its validity is not impaired.<sup>2</sup> If, however, he means an actual fraud, the consequence is, in reason, supported sufficiently by authority, though on this point the adjudications are not as distinct as on some others, that the other party will be discharged; even where, on a critical examination, the legal construction of the contract is found not to have been changed.<sup>3</sup> An alteration which, to any degree, varies the legal effect of the instrument, to the prejudice of the other party, releases the latter from it. No actual fraud need be meditated in making such an alteration; it is a fraud in law, where it is not in fact.<sup>4</sup>

**§ 640. Executed.** — If, before the alteration is made, the

<sup>1</sup> *Ogle v. Graham*, 2 Pa. 132; *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Broughton v. West*, 8 Ga. 248; *Huntington v. Finch*, 3 Ohio State, 445, 448; *Brownell v. Winne*, 29 N. Y. 400; *Union Bank v. Cook*, 2 Cranch C. C. 218. It seems, however, to be the doctrine of some courts, that a material alteration, though not prejudicial to the other party, discharges him. *Bowers v. Briggs*, 20 Ind. 139; *Chadwick v. Eastman*, 53 Maine, 12.

<sup>2</sup> *Hunt v. Adams*, 6 Mass. 519; *The State v. Cilley*, cited 1 N. H. 97; *Rhoades v. Castner*, 12 Allen, 130; *Park v. Glover*, 23 Texas, 469; *Nichols v. Johnson*, 10 Conn. 192; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Burnham v. Ayer*, 35 N. H. 351; *Langdon v. Paul*, 20 Vt. 217; *Reed v. Kemp*, 16 Ill. 445; *Dunn v. Clements*, 7 Jones, N. C. 58; *The State v. Dean*, 40 Misso. 464; *Shelton v. Deering*, 10 B. Monr. 405; *Aldous v. Cornwell*, Law Rep. 3 Q. B. 573; *Major v. Hansen*, 2 Bis. 195; *Huntington v. Finch*, 3 Ohio State, 445;

<sup>3</sup> *1 Greenl. Ev. § 578*; *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Adams v. Frye*, 3 Met. 108; *Nunnery v. Cotton*, 1 Hawks, 222; *Lewis v. Payn*, 8 Cow. 71; *Wright v. Wright*, 2 Halst. 175; *Malin v. Malin*, 15 Johns. 293. *Contra*, *Moye v. Herndon*, 30 Missis. 110.

<sup>4</sup> *Porter v. Doby*, 2 Rich. Eq. 49; *Washington Savings Bank v. Ecky*, 51 Misso. 272; *Boston v. Benson*, 12 Cush. 61; *Richmond Manuf. Co. v. Davis*, 7 Blackf. 412; *Mollett v. Wackerbarth*, 5 C. B. 181; *Wheclock v. Freeman*, 18 Pick. 165, 168; *Stoddard v. Penniman*, 108 Mass. 366; *Schwalm v. McIntyre*, 17 Wis. 232; *Smith v. Mace*, 44 N. H. 553; *Hirschman v. Budd*, Law Rep. 8 Ex. 171; *Hirschfeld v. Smith*, Law Rep. 1 C. P. 340, 353.

contract has had its effect and is ended,—as, if it is a deed of lands, and the deed is delivered, and the title has vested in the grantee,—an alteration, however fraudulently intended, does not undo what has thus been done.<sup>1</sup> But where any executory part remains, it cannot be enforced.<sup>2</sup>

§ 641. **All Forms of Written Contract.**—The doctrines of this chapter apply equally to all written contracts, whether simple or under seal, and whatever their subjects. Contrary intimations, in some of the older cases, are not sound in principle, and they are now discarded.<sup>3</sup>

§ 642. *The Doctrine of this Chapter restated.*

When a written contract has been made, common duty and prudence require that the party in possession of the writing should carefully preserve it. If, without his fault, another gets unlawful possession of it and destroys it,—or, if with innocent purpose he makes in it some alteration which does not vary it to the prejudice of the other party,—this will not impair his rights under it. But if he commits its custody to one who alters it in his interest,—or, if he authorizes another so to alter it, and it is done,—or, if he does it himself,—he forfeits, by this bad faith or want of due care, all his rights under it. Yet if it has already taken effect, and his rights have become vested, no alteration of the defunct contract can revest them in another. Bad faith, acted upon by the defrauded party, may operate as an estoppel; but, not acted upon, as in the cases now supposed, it cannot.<sup>4</sup>

<sup>1</sup> *Collier v. Jacoby*, 9 Cow. 125; *Kendall v. Kendall*, 12 Allen, 92; *Speer v. Speer*, 7 Ind. 178; *Chessman v. Whittemore*, 23 Pick. 231; *Lewis v. Payn*, 8 Cow. 71; *Gillespie v. Reed*, 3 McLean, 377. See *Wallace v. Harmstad*, 8 *Wright*, Pa. 492.

<sup>2</sup> *Arrison v. Harmstead*, 2 Barr, 191; *Wallace v. Harmstad*, 3 *Harris*, Pa. 462; *Waring v. Smyth*, 2 Barb. Ch. 119.

<sup>3</sup> *Aldous v. Cornwell*, Law Rep. 3 Q. B. 573.

<sup>4</sup> *Ante*, § 127 et seq.

## CHAPTER XXXIII.

## THE ALTERING OF CONTRACTS BY MUTUAL CONSENT.

§ 643. **Simple Written Contract altered by Writing.** — If, after a simple contract in writing is executed, the parties mutually consent to any alteration in the writing, this, when made, creates a new contract,<sup>1</sup> consisting of the old one and the altered part. The transaction is valid.<sup>2</sup> But —

§ 644. **Party not consenting.** — A surety,<sup>3</sup> or a third party,<sup>4</sup> not consulted about the alteration or not consenting, is thereby discharged. It is good as to those who do consent.<sup>5</sup>

§ 645. **Oral Altering of Simple Written.** — As oral and written contracts, not under seal, are of equal grade,<sup>6</sup> if the parties to a simple contract in writing agree orally to any change in it, and it is not of a sort which the statute of frauds or any other statute or technical rule of law requires to be in writing, the change thus orally made is valid.<sup>7</sup> And —

<sup>1</sup> *Ante*, § 31, 58; *Vicary v. Moore*, 2 Watts, 451; *Dana v. Hancock*, 30 Vt. 616; *Briggs v. Vermont Central Railroad*, 31 Vt. 211; *Lawall v. Rader*, 12 Harris, Pa. 283.

<sup>2</sup> *Wilson v. Henderson*, 9 Sm. & M. 375; *People v. Call*, 1 Denio, 120.

<sup>3</sup> *Gardiner v. Harback*, 21 Ill. 129; *Ryan v. Parker*, 1 Ire. Eq. 89; *Darwin v. Rippey*, 63 N. C. 318.

<sup>4</sup> *Crockett v. Thomason*, 5 Sneed, Tenn. 342; *Goodman v. Eastman*, 4 N. H. 455; *King v. Hunt*, 13 Misso. 97; *Fay v. Smith*, 1 Allen, 477; *Prettyman v. Goodrich*, 28 Ill. 330.

<sup>5</sup> *Warring v. Williams*, 8 Pick. 322; *Broughton v. Fuller*, 9 Vt. 373; *The State v. Van Pelt*, 1 Ind. 304; *Smith v. Weld*, 2 Barr, 54. And see *Harper v. The State*, 7 Blackf. 61; *Briggs v. Glenn*, 7 Misso. 572.

<sup>6</sup> *Ante*, § 54.

<sup>7</sup> *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Cartright v. Clopton*, 232

**§ 646. Effect of Clause not to alter.** — Such oral alteration is valid even though the parties have in their writing agreed not to make it, or declared that an oral alteration would be void; for, by word of mouth, they can waive the written agreement.<sup>1</sup>

**§ 647. Becomes all Oral — New Contract — Consideration.** — Such written contract, thus orally altered, becomes, in law, all oral, as we have already seen.<sup>2</sup> Consequently the oral alteration is the making of a new contract, which, like any other, must be founded on a consideration. But the transaction constitutes also the annulling of the old contract, and this is ordinarily an adequate consideration for the new; the doctrine being general, that the surrender of one valid contract (not of an invalid one<sup>3</sup>) will, as a consideration, make valid another.<sup>4</sup> Where there is a mere promise by the one party, and no relinquishment or waiver of anything by the other, then, of course, the promise is

25 Ga. 85; *Langford v. Cummings*, 4 Ala. 46; *Miles v. Roberts*, 34 N. H. 245; *Richardson v. Cooper*, 25 Maine, 450; *Grafton Bank v. Woodward*, 5 N. H. 99; *Frost v. Everett*, 5 Cow. 497; *Keating v. Price*, 1 Johns. Cas. 22; *Rhodes v. Thomas*, 2 Ind. 638.

<sup>1</sup> *McFadden v. O'Donnell*, 18 Cal. 160; *Westchester Fire Ins. Co. v. Earle*, *supra*; *Smith v. Gugerty*, 4 Barb. 614. *Contra*, *White v. San Rafael, etc., Railroad*, 50 Cal. 417. See *Barker v. Troy and Rutland Railroad*, 27 Vt. 766.

<sup>2</sup> *Ante*, § 58, 643.

<sup>3</sup> *Louisville Bank v. Young*, 37 Misso. 398; *Holden v. Cosgrove*, 12 Gray, 216; *Crosby v. Wood*, 2 Seld. 369; *Van Allen v. Jones*, 10 Bosw. 369.

<sup>4</sup> *Weld v. Nichols*, 17 Pick. 538, 543; *Munroe v. Perkins*, 9 Pick. 298, 305; *Scott v. McKinney*, 98 Mass. 344, 348; *Woodward v. Miles*, 4 Fost. N. H. 289; *Connelly v. Devoe*, 37 Conn. 570; *Montgomery v. Morris*, 32 Ga. 173; *Taylor v. Meek*, 4 Blackf. 388; *Perry v. Buckman*, 33 Vt. 7; *Hildreth v. Pinkerton Academy*, 9 Fost. N. H. 227; *Doyle v. Dixon*, 97 Mass. 208; *Calhoun v. Calhoun*, 37 Missis. 668; *Spann v. Baltzell*, 1 Fla. 301. In *Thurston v. Hays*, 6 Ohio State, 1, this obvious view of the question of the consideration was overlooked by the learned judge who delivered the opinion of the court; but, though we should deem his reasoning to be in a measure unsound, still the conclusion was unquestionably correct. There are two or three grounds for this; one being, that, by the statute of frauds, the contract, if made oral, would have become void. But the evidence was distinct, that both the parties deemed it to be subsisting in some form.

void for the want of consideration.<sup>1</sup> And there may be cases, where, in fact, as the law views the transaction, while nominally the parties concur, it amounts only to a promise on one side, nothing being relinquished on the other ; when, of course, to be valid, there must be a fresh consideration.<sup>2</sup>

**§ 648. Altering where Writing is Essential to Validity.**— We have seen that the central object of interpretation is to ascertain and carry out the meaning of parties, so that even particular words are made to give way to the ascertained intent.<sup>3</sup> And, in pursuance of this rule, where plainly their purpose is to bind themselves by contract, every possible effort will be put forth so to shape their meaning as to render their undertaking valid.<sup>4</sup> The result of which is, that, if, in writing, parties have entered into a contract of a sort to be good only in the written form, and then they interchange such oral words as would ordinarily be understood to vary the contract ; still, if the change would make it void, and it is plain they mean it shall remain valid, such words, not being reconcilable with the rest of the transaction, will be rejected as repugnant and of no effect.<sup>5</sup> Thus, —

**§ 649. Promissory Note.** — By the law-merchant, an oral promissory note is impossible ; it must be in writing.<sup>6</sup> Consequently an oral agreement varying such a note is

<sup>1</sup> *Robbins v. Potter*, 98 Mass. 532 ; *Richardson v. Williams*, 49 Maine, 558 ; *Styron v. Bell*, 8 Jones, N. C. 222 ; *Bixler v. Ream*, 3 Pa. 282. And see *Collins v. Baumgardner*, 2 Smith, Pa. 461.

<sup>2</sup> *Ante*, § 412, 414, 421 ; *McDugald v. McFadgin*, 6 Jones, N. C. 89 ; *Peelman v. Peelman*, 4 Ind. 612 ; *Colcock v. Louisville Railroad*, 1 Strob. 329 ; *Clark v. Small*, 6 Yerg. 418 ; *Whitson v. Fowlkes*, 1 Head, 533 ; *Hawley v. Farrar*, 1 Vt. 420 ; *Barlow v. Smith*, 4 Vt. 139 ; *Clifton v. Litchfield*, 106 Mass. 34.

<sup>3</sup> *Ante*, § 575, 578.

<sup>4</sup> *Ante*, § 582, 583, 585.

<sup>5</sup> *Ante*, § 580.

<sup>6</sup> *Ante*, § 587.

repugnant to the whole transaction, and it must be rejected as void.<sup>1</sup> Again,—

§ 650. **Statute of Frauds.**—Agreements which, to be valid, must by the statute of frauds be in writing, cannot be orally varied. The admission of the evidence would introduce a repugnancy, and it must be rejected;<sup>2</sup> or, in another form of the proposition, the oral agreement is invalid, and what is invalid cannot vary or annul what is valid.<sup>3</sup> Still there are cases in which the intent to depart from the writing and substitute a new and oral contract is so evident as to render the rejection of the latter impossible; and then, the written contract being gone, the oral will come under the condemnation of the statute.<sup>4</sup> On the other hand, if the oral variation stops at a point which leaves a sufficient memorandum in writing to answer the requirements of the statute, it may have effect, the same as in a case where no writing was originally necessary. On this ground, some courts hold that the time of performance may be orally varied,<sup>5</sup> while others maintain the contrary.<sup>6</sup>

§ 651. **Specialties.**—We have seen, in general, what the doctrine is as to instruments under seal.<sup>7</sup> The adjudications on the subject appear in great confusion; but, if we look into the principle which should govern them, we shall find the result to be as follows:—

**First. Where Sealing is not Essential.**—If, in the particular instance, an oral agreement, or a written one not

<sup>1</sup> *Adler v. Friedman*, 16 Cal. 138. The proposition of the text is obvious, and needs no authority to sustain it. In mere authority, I should not deem this case adequate; for, neither by necessary implication, nor by any distinct utterance, does it exactly cover the proposition.

<sup>2</sup> *Ante*, § 647, note; *Giraud v. Richmond*, 2 C. B. 835; *Moore v. Campbell*, 10 Exch. 323.

<sup>3</sup> *Noble v. Ward*, Law Rep. 2 Ex. 135, 138.

<sup>4</sup> *Sanderson v. Graves*, Law Rep. 10 Ex. 234.

<sup>5</sup> *Stearns v. Hall*, 9 Cush. 31.

<sup>6</sup> *Stead v. Dawber*, 10 A. & E. 57; *Noble v. Ward*, Law Rep. 1 Ex. 117, 2 Ex. 135.

<sup>7</sup> *Ante*, § 30-37.

sealed, would be good in law, there is no objection to varying the specialty by words without seal, and thus reducing the transaction to a simple contract. But even then the presumption will be violent that this is not meant, and the change will be held to take place only where the intent is clear.<sup>1</sup> And never, where a sealed instrument is altered without seal, will it remain a specialty.<sup>2</sup>

§ 652. **Secondly. Where Sealing is Essential.**—If the instrument would be void, for the purpose meant, without a seal, then the doctrine of some previous sections,<sup>3</sup> together with that of the last, will apply. As, in such a case, the intention of the parties is, on the very face of their act, not to annul their contract, and as the alteration if held effectual would annul it,—as, therefore, their whole act cannot stand, because one part is repugnant to the rest,—the courts should adjudge the part void which does not overturn the whole purpose of the parties. Since, if the alteration took effect, there would cease to be a contract, such alteration should be adjudged null.

§ 653. **Form of Altering Specialty by Consent.**—The foregoing views apply to cases where plainly the altered matter cannot be deemed incorporated with that under seal, so as to constitute a part of it. But, by writing,—as, by an interlineation,—after an instrument is sealed, and even after it is delivered, there may be a valid alteration of it, where due formalities are observed. There is a difference of opinion, with some confusion in the cases, as to what must be the formalities. By all opinions, if, while the delivered contract is in its executory condition, the parties are together, and then the instrument is handed back to him who sealed it, and then the latter alters it by consent of the other, or assents to an alteration made by a third per-

<sup>1</sup> See *Burns v. Allen*, 9 Ire. 370.

<sup>2</sup> *Vaughn v. Ferris*, 2 Watts & S. 46; *Eddy v. Graves*, 23 Wend. 82; *Robbins v. Ayres*, 10 Misso. 538.

<sup>3</sup> *Ante*, § 648-650.

son in his presence, and redelivers it, the transaction will be valid. And it appears to be the doctrine of some of the cases that nothing short of this will do.<sup>1</sup> Indeed, such seems to be the result of principles already brought to view;<sup>2</sup> or, at least, the equivalent of this would seem to be required. Some of the American cases, however, appear to concede the validity of proceedings less strict, but it would be difficult to derive from them any exact rule.<sup>3</sup>

§ 654. *The Doctrine of this Chapter restated.*

Every agreement may be varied by the parties before performance; for, where they can agree, they can agree

<sup>1</sup> In Add. Con. 11th Eng. ed. 288, the statement of the author, with his authorities, is as follows: "If, after a deed is executed, material blanks purposely left in it are filled up with the assent of all the parties to the instrument, or if a schedule is added to the deed describing certain property upon which the deed is to operate, and the deed is insensible and inoperative without the schedule (*Weeks v. Maillardet*, 14 East, 568, 572), or if a new covenantor is added (*Gardner v. Walsh*, 5 Ellis & B. 83, 24 Law J. n. s. Q. B. 285), the deed must be redelivered (*Markham v. Gonaston*, 9 East, 354, note; *Hudson v. Revett*, 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123; *Keele v. Wheeler*, 13 Law J. n. s. C. P. 170, 8 Scott N. R. 323; *Enthoven v. Hoyle*, 21 Law J. n. s. C. P. 100), and must have a fresh stamp (*French v. Patton*, 9 East, 351); but blanks left for filling in dates previously agreed upon, or the names of persons not being parties to the deed, may be filled up after the execution of the instrument. *Adsetts v. Hives*, 33 Beav. 56. And a bond remaining in the hands of the agent of the obligor as an escrow, is not avoided by the addition of another obligor, with the assent of the agent, before the delivery of the instrument of the obligee. *Matson v. Booth*, 5 M. & S. 223, 226; *Hudson v. Revett*, 2 Moore & P. 691. Nor, when a deed *inter partes* is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, does such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, avoid the deed. *Lewis v. Bingham*, 4 B. & Ald. 672, 676; *Hall v. Chandless*, 12 Moore, 316, 4 Bing. 123."

<sup>2</sup> *Ante*, § 16-18, 30-37, 168, 169, 370, 397-400.

<sup>3</sup> See, as representing various American views, *Cotten v. Williams*, 1 Fla. 37; *Thompson v. Williams*, 1 Fla. 56; *McIntyre v. Park*, 11 Gray, 102; *Cleaton v. Chambliss*, 6 Rand. 86; *Ex parte Decker*, 6 Cow. 60; *Speake v. United States*, 9 Cranch, 28; *Boardman v. Williams*, 1 Stew. 517; *Woolley v. Constant*, 4 Johns. 54; *Ex parte Kerwin*, 8 Cow. 118.

over again. But, if the law has provided special forms for the original contract, the new one cannot be made in utter disregard of those forms. Out of this plain proposition, and out of attempts which parties sometimes make to reagree in disregard of it, grow the difficulties connected with the subject of this chapter. They do not require to be repeated.

## CHAPTER XXXIV.

WAIVER.<sup>1</sup>

§ 655. **What—How defined.**—Waiver pertains, not merely to the law of contracts, but also to judicial proceedings, and to nearly every other department of the law, civil and criminal.<sup>2</sup> The doctrine is not quite free from technicalities; but, in a general way, waiver may be said to occur wherever one, in possession of a right conferred either by law or by contract, and knowing the attendant facts, does or forbears to do something inconsistent with the existence of the right, or of his intention to rely upon it; in which case, he is said to have waived it, and he is estopped from claiming anything by reason of it afterward. Thus, in the law of contracts,<sup>3</sup>—

§ 656. **Landlord and Tenant—Forfeiture.**—Where a lease of lands provides, that the lessee shall forfeit his estate in them if he assigns it, or permits an auction on the premises, or neglects to pay rent due, or the like; then, should a forfeiture occur, it will be waived by the landlord, who can never afterward insist upon it, if he takes pay for subsequent rent, or does anything else, by which in legal effect he recognizes the continued existence of the lease.<sup>4</sup> Again,—

<sup>1</sup> Consult ante, § 446-453.

<sup>2</sup> See 1 Bishop Crim. Proced. § 117 et seq.

<sup>3</sup> See, for illustrations of the doctrine of waiver, the following cases not referred to elsewhere in this chapter: *Bosler v. Reheem*, 22 Smith, Pa. 54; *Bryant v. Wilcox*, 49 Cal. 47; *Chiniquy v. People*, 78 Ill. 570; *Moore v. Reed*, 2 Ire. Eq. 580; *Luske v. Hotchkiss*, 37 Conn. 219; *Detroit v. Whittemore*, 27 Mich. 281; *Long Island Ferry v. Terbell*, 48 N. Y. 427.

<sup>4</sup> *Coon v. Brickett*, 2 N. H. 168; *Western Bank v. Kyle*, 6 Gill, 343; *Clark*

**§ 657. Time and Manner of Performance.**—One by standing by and not objecting, or by words, may so acquiesce in changes in the time and manner of performing a contract, as to be estopped to deny that it has been performed according to its terms; though, in strictness, it has not been.<sup>1</sup> The distinction between this sort of case, and that in which the change will be held to constitute a new contract, is not quite so plainly drawn in the adjudged cases as we might desire; still its existence, in point of legal doctrine, is well established.<sup>2</sup> The waiver may be by act subsequent to a default, the same as before; as, where one acquiesces in the doing to-day of what ought to have been performed yesterday.<sup>3</sup>

**§ 658. With Knowledge.**—Knowledge of the facts is of the essence of waiver, which does not take effect by anything done in ignorance of them.<sup>4</sup> Thus,—

**§ 659. Breach of Condition.**—If one has broken a condition in his contract, the other does not waive it by whatever act, unless he knows of the breach.<sup>5</sup> And—

**§ 660. Defect in Manufacture.**—The acceptance of an article manufactured under a contract, if the article contains

<sup>1</sup> Jones, 1 Denio, 516; McGlynn *v.* Moore, 25 Cal. 384; McKildoe *v.* Darra-cott, 18 Grat. 278; Toleman *v.* Porthury, Law Rep. 6 Q. B. 245, 248; Mitchell *v.* Steward, Law Rep. 1 Eq. 541; Grimwood *v.* Moss, Law Rep. 7 C. P. 360. See ante, § 206.

<sup>2</sup> See post, § 662.

<sup>3</sup> McCombs *v.* McKennan, 2 Watts & S. 216; Wilhelm *v.* Caul, 2 Watts & S. 26; Fisher *v.* Smith, 48 Ill. 184; Stead *v.* Dawber, 10 A. & E. 57, 64; McNaughton *v.* Cassally, 4 McLean, 530; Ex parte Booker, 18 Ark. 388; Bur-rill *v.* Saunders, 36 Maine, 409; Vroman *v.* Darrow, 40 Ill. 171; Cuff *v.* Penn, 1 M. & S. 21; Chicago, etc., Railway *v.* Van Dresar, 22 Wis. 511; Adams *v.* Hill, 16 Maine, 215; Palmer *v.* Stockwell, 9 Gray, 237; Shaw *v.* The Turn-pike, 2 Pa. 454; Dare *v.* Spencer, 5 Blackf. 491.

<sup>4</sup> Jordan *v.* Rhodes, 24 Ga. 478; Nibbe *v.* Brauhn, 24 Ill. 268; McCord *v.* West Feliciana Railroad, 3 La. An. 285; Lagrave *v.* Fowler, 4 La. An. 243; Fox *v.* Harding, 7 Cush. 516; Lawrence *v.* Davey, 28 Vt. 264; Baldwin *v.* Farnsworth, 1 Fairf. 414.

<sup>5</sup> Darnley *v.* London, etc., Railway, Law Rep., 2 H. L. 43, 57; Benedict *v.* Miner, 58 Ill. 19.

<sup>6</sup> Gray *v.* Blanchard, 8 Pick. 284, 292.

a latent defect unknown to him who accepts it, is not a waiver which will preclude his recovering damages for the defect.<sup>1</sup> Again,—

§ 661. **Stoppage in Transitu.**—Under the law of sales, if a man sells goods on credit to another, who, while they are undelivered in the possession of warehousemen and common carriers, becomes insolvent, he may reclaim and hold them, unless the insolvent purchaser will pay for them. This is termed stoppage *in transitu*.<sup>2</sup> But the right thus to reclaim them may be waived; as, if the seller, instead of exercising it, attaches them as the property of the buyer.<sup>3</sup> Still if, when he takes legal steps inconsistent with the exercise of this right, he is ignorant of the facts, he may stop the goods and decline to press his suit, on the truth coming to his knowledge.<sup>4</sup>

§ 662. **Consideration — (Withdrawing Waiver — Executed).**—If, in terms, one waives his right, but receives no consideration for the waiver, and no step has been taken under it, this mere license may be withdrawn at the pleasure of him who gave it.<sup>5</sup> But if the thing has been done, however destitute of consideration the waiver was, the case is like that of any executed gift, or other executed contract not founded on a consideration; that is, what is performed through mutual consent cannot be recalled.<sup>6</sup> So—

§ 663. **Simultaneous with Performance.**—A waiver which is simultaneous with the transaction to which it pertains, cannot be recalled; as, if a man when applied to refuses to do what his contract requires, but does not make an objection which he might to time and manner; this is a

<sup>1</sup> Cassidy *v.* Le Fevre, 45 N. Y. 562; Strawn *v.* Gogswell, 28 Ill. 457; Moulton *v.* McOwen, 108 Mass. 587.

<sup>2</sup> 2 Kent Com. 540.

<sup>3</sup> Woodruff *v.* Noyes, 15 Conn. 335.

<sup>4</sup> Calahan *v.* Babcock, 21 Ohio State, 281, 294.

<sup>5</sup> Dunning *v.* Mauzy, 49 Ill. 368; Boutwell *v.* O'Keefe, 32 Barb. 434.

<sup>6</sup> Lawrence *v.* Dole, 11 Vt. 549.

waiver of the objection, which afterward he is too late to bring forward, nor can he claim that the waiver was without consideration.<sup>1</sup> Or, if there is an agreement to do a thing in a particular time or manner, an acceptance of the doing in another time and manner, proceeding from no separate consideration, will be good.<sup>2</sup>

§ 664. *The Doctrine of this Chapter restated.*

A party may waive any right under a contract; but, while the waiver remains without consideration, and nothing has been done under it, he can withdraw it at pleasure. After steps under it have been taken or forborne by the other party, he is estopped to withdraw it; or, in another view, the taking or omitting of the steps may be deemed a consideration, which will render the waiver binding.

An executory contract, in the form of a waiver, cannot be withdrawn when founded on a consideration. But, in legal language, the term waiver is not employed to designate such a contract.

<sup>1</sup> *Dunlap v. Hunting*, 2 Denio, 643; *Merritt v. Cotton States Life Ins. Co.*, 55 Ga. 103; *Morgan v. Stearns*, 40 Cal. 434; *Dresel v. Jordan*, 104 Mass. 407; *Stover v. Flack*, 30 N. Y. 64; *Connelly v. Devoe*, 37 Conn. 570; *Pullman v. Corning*, 5 Selden, 93; *Corbitt v. Stonemetz*, 15 Wis. 170.

<sup>2</sup> *Porter v. Stewart*, 2 Aikens, 417; *Warren v. Mains*, 7 Johns. 476; *O'Bannum v. Relf*, 7 Dana, 320; *Lawrence v. Davey*, 28 Vt. 264; *Haskell v. Blair*, 3 *Cush.* 534; *ante*, § 657.

## CHAPTER XXXV.

## RESCISSON AND RELEASE OF THE EXECUTORY CONTRACT.

- ¶ 665-666. Introduction.
- 667-672. By Mutual Consent.
- 673-681. By one Party for the other's Fault.
- 682-685. By one Party wrongfully.
- 686. Doctrine of the Chapter restated.

§ 665. **Course of the Discussion.** — In the chapter before the last, one way of putting an end to a contract was considered; namely, substituting another for it. In the chapter next preceding that one, we saw how, where it is in writing, a party may discharge the other by making in it an unauthorized alteration. In the next chapter, we shall discuss the ordinary breach of contracts and their performance. A breach may furnish ground for rescission; but that will be considered, in connection with the other causes for rescission, in this chapter.

§ 666. **How the Chapter divided.** — Three methods of terminating a contract will be brought to view in this chapter, in the following order; namely, I. By Mutual Consent; II. Rightfully, by one Party, because of some Incapacity, Wrong, or Default in the other; III. Wrongfully, by one Party, without the other's consent.

I. *By Mutual Consent.*

§ 667. **Reversing Act of Formation.** — What parties can do they can undo. If, therefore, they have entered into a contract founded in mutual promises, whether verbal or in writing,—or, if in writing, whether the law requires it to

be so or not,—they can jointly, before anything is done under it, withdraw these promises ; and, whether the withdrawal is in writing or by oral words, that is the end of the contract.<sup>1</sup> Or, if it was under seal, they can mutually do the same thing with the same effect, merely adding the destruction of the seal.<sup>2</sup> And if a consideration in money or other valuables was given, it can be returned to the giver, and all will stand as before. So much is clear : but difficulties may arise where the acts claimed to constitute a rescission have not progressed so far ; for it may take place where, to outward appearance, less is done. Thus,—

**§ 668. Implied—(Both Parties in Fault).**—The mutual consent to a rescission need not be by express words, being equally valid if implied.<sup>3</sup> It is sufficiently implied, for example, where both parties are in default, so that neither can sue the other ; or where both discard the contract.<sup>4</sup>

**§ 669. Return of Consideration.**—We have seen, that, where the rescission proceeds from one party alone as of right, he must return, or offer to return, whatever he received from the other under the contract.<sup>5</sup> If it is by mutual consent, doubtless the one party can make to the other a present of any money or other thing originally paid as con-

<sup>1</sup> *Stead v. Dawber*, 10 A. & E. 57, 65 ; *Coles v. Trecothick*, 9 Ves. 234, 250 ; *Forbes v. Smiley*, 56 Maine, 174 ; *Waugh v. Blevins*, 68 N. C. 167 ; *Goman v. Salisbury*, 1 Vern. 240 ; *Gatlin v. Wilcox*, 26 Ark. 309 ; *Cutler v. Smith*, 43 Vt. 577 ; *Guthrie v. Thompson*, 1 Oregon, 353 ; *Ward v. Walton*, 4 Ind. 75 ; *Beach v. Covillard*, 4 Cal. 315 ; *Natchez v. Minor*, 9 Sm. & M. 544 ; *Moore v. Shenk*, 3 Barr, 18 ; *Lauer v. Lee*, 6 Wright, Pa. 165 ; *Borum v. Garland*, 9 Ala. 452 ; *Mills v. Riley*, 7 Ind. 137.

<sup>2</sup> *Matthewson v. Lydiate*, Cro. Eliz. 546 ; *Cross v. Powel*, Cro. Eliz. 483. See further, as to annulling a sealed instrument, ante, § 30-37 ; *McDonald v. Mountain Lake Water Co.*, 4 Cal. 335 ; *Union Bank v. Call*, 5 Fla. 409.

<sup>3</sup> *Wheeden v. Fiske*, 50 N. H. 125 ; *Fine v. Rogers*, 15 Misso. 513 ; *Jones v. Neale*, 2 Pat. & H. 339.

<sup>4</sup> *Harris v. Bradley*, 9 Ind. 166 ; *Ford v. Smith*, 25 Ga. 675.

<sup>5</sup> *Ante*, § 203. That was where the rescission is for the fraud of the other party, but the same rule applies in other cases. *Hunt v. Silk*, 5 East, 449 ; *Jarrett v. Morton*, 44 Misso. 275 ; *Johnson v. Walker*, 25 Ark. 196 ; *Ellington v. King*, 49 Ill. 449 ; *Young v. Stevens*, 48 N. H. 133.

sideration for the agreement, or this may be made a consideration for the rescission; but, in the absence of any express stipulation, the party who paid can recover back the payment.<sup>1</sup>

§ 670. **Executed.**—Where a contract has been fully executed, having accomplished its mission, there is plainly nothing to rescind. A reversing of what was done would be merely the making and carrying out of a new agreement. For example,—

§ 671. **Cancelling Deed of Land.**—As the title of land can pass only by deed, if a grantee in whom the estate has vested delivers back his deed, or it is cancelled by mutual consent, this, while it may constitute an agreement to reconvey, does not reinvest the original grantor with the title.<sup>2</sup> There may be circumstances varying the effect; as, if the deed has not been recorded, a subsequent conveyance from the original grantor to a third person will transmit the title to the latter.<sup>3</sup> And, in some of the States, the rule seems to prevail, that the surrender of an unrecorded deed will transfer the seisin back to the grantor.<sup>4</sup> But the general doctrine is as above stated.

<sup>1</sup> *Barber v. Lyon*, 8 Blackf. 215; *Clark v. King*, 2 Car. & P. 286; *Jenkins v. Thompson*, 20 N. H. 457; *Carter v. Carter*, 14 Pick. 424; *Lebanon v. Heath*, 47 N. H. 358; *Kelsey v. United States*, 1 Ct. Cl. 374; *Bales v. Weddle*, 14 Ind. 349; *Harris v. Bradley*, 9 Ind. 166; *Chapman v. Shaw*, 5 Greenl. 59; *Smith v. Lamb*, 26 Ill. 396; *Blood v. Enos*, 12 Vt. 625. See *Jones v. Loggins*, 37 Miss. 546.

<sup>2</sup> *Kearns v. Kilian*, 18 Cal. 491; *Lawton v. Gordon*, 34 Cal. 36; *Parshall v. Shirts*, 54 Barb. 99, 104; *Linker v. Long*, 64 N. C. 296; *Holbrook v. Tirrell*, 9 Pick. 105; *Steel v. Steel*, 4 Allen, 417, 422; *Van Hook v. Simmons*, 25 Texas, Supp. 323; *Fawcetts v. Kimmey*, 33 Ala. 261; *Gimon v. Davis*, 36 Ala. 589; *Killey v. Wilson*, 33 Cal. 690; *Jordan v. Pollock*, 14 Ga. 145; *Wilson v. Hill*, 2 Beasley, 143; *Raynor v. Wilson*, 6 Hill, N. Y. 469; *Connelly v. Skelly*, 8 Blackf. 320; *Morgan v. Elam*, 4 Yerg. 375; *Graysons v. Richards*, 10 Leigh, 57; *Parker v. Kane*, 4 Wis. 1. And see *ante*, § 640.

<sup>3</sup> *Holbrook v. Tirrell*, *supra*.

<sup>4</sup> *Sawyer v. Peters*, 50 N. H. 143; *Tomson v. Ward*, 1 N. H. 1; *Nason v. Grant*, 21 Maine, 160; *Parker v. Kane*, 22 How. U. S. 1.

§ 672. **Performed on one Side — Broken.** — If the contract has been performed on one side, and only money remains to be paid on the other, the case is like that of any other debt, and the discharge must be made in like manner. The same also may be said of a breach, resulting in damages.<sup>1</sup>

II. *Rightfully, by one Party, because of some Incapacity, Wrong, or Default in the other.*

§ 673. **Originally voidable.** — It is within doctrines discussed in earlier parts of this volume to say, that, if a contract is originally voidable by one of the parties,—as, where it is illegal only in the other party,<sup>2</sup> or it is oral and within the statute of frauds,<sup>3</sup> or it was procured by the fraud of the other party,<sup>4</sup>—the party not in fault may avoid it, or treat it as void. So,—

§ 674. **Voidable by Matter subsequent.** — If the consideration has failed,<sup>5</sup> the party whose promise was made on the strength of it can avoid the contract.<sup>6</sup> And, in other circumstances, where it was not voidable from the beginning, one of the parties may so conduct himself as to give the other the right to have it rescinded. Therefore, by whatever name we now call the contract, it has become really voidable, the same as though it were originally so. Not improperly, therefore, it may be termed voidable; that is, voidable because of matter subsequent. This sort of voidable contract forms the principal topic under our present sub-title.

§ 675. **Election to avoid or not — (Successive Steps —**

<sup>1</sup> *Nesbitt v. McGehee*, 26 Ala. 748; *Cutler v. Smith*, 43 Vt. 577; *Palmer v. Green*, 6 Conn. 14; *Kidder v. Kidder*, 9 *Casey*, Pa. 268.

<sup>2</sup> *Ante*, § 465, 466; *Lafferty v. Jelley*, 22 Ind. 471.

<sup>3</sup> *Davis v. Townsend*, 10 *Barb.* 333.

<sup>4</sup> *Ante*, § 203.

<sup>5</sup> *Ante*, § 426.

<sup>6</sup> *Robinson v. Bright*, 3 *Met. Ky.* 30.

**Breach).** — When parties have entered into a contract requiring successive steps to be taken by each, if one declines or is unable to take his step while the other is ready and willing, the latter may proceed against the former for damages by reason of this breach ; or, in some circumstances, not in all, he may, should he prefer, rescind the contract. He cannot do both.<sup>1</sup>

**§ 676. Nature of the Breach.** — The breach, to justify a rescission, must be of a dependent covenant, or wilful, or in a substantial part and going to the root of the matter. That it will sustain an action by the injured party is not always sufficient.<sup>2</sup> It may proceed from either —

**§ 677. Inability or Refusal.** — Where one of the parties disposes of the thing contracted about or otherwise disqualifies himself or becomes unable to perform,<sup>3</sup> or in words or by their equivalent in act declines to go on,<sup>4</sup> the other party may rescind the contract.

**§ 678. Rescission before Affirmance.** — One cannot rescind a contract, which, with knowledge that it has been broken, he has affirmed by doing anything in recognition of its continued existence.<sup>5</sup>

<sup>1</sup> *Coddington v. Paleologo*, Law Rep. 2 Ex. 193; *Boult v. Mitchell*, 3 Harris, Pa. 371; *Powell v. Sammons*, 31 Ala. 552; *Dodge v. Greeley*, 31 Maine, 343; *Rogers v. Hanson*, 35 Iowa, 283; *Cromwell v. Wilkinson*, 18 Ind. 365; *Goodrich v. Lafflin*, 1 Pick. 57; *Pierce v. Duncan*, 2 Fost. N. H. 18; *Mansfield v. Trigg*, 118 Mass. 350.

<sup>2</sup> *Wright v. Haskell*, 45 Maine, 489; *Miller v. Phillips*, 7 Casey, Pa. 218; *Fletcher v. Cole*, 23 Vt. 114; *Gatlin v. Wilcox*, 26 Ark. 309; *Selby v. Hutchinson*, 4 Gilman, 319; *Dodge v. Greeley*, 31 Maine, 343; *Webster v. Enfield*, 5 Gilman, 298; *Reid v. Davis*, 4 Ala. 83; *Simpson v. Crippin*, Law Rep. 8 Q. B. 14; *Luey v. Bundy*, 9 N. H. 298; *Allen v. Webb*, 4 Fost. N. H. 278; *Preble v. Bottom*, 27 Vt. 249; *Townsend v. Hurst*, 37 Missis. 679.

<sup>3</sup> *Post*, 2 690; *Pratt v. Philbrook*, 41 Maine, 132; *Miller v. Phillips*, 7 Casey, Pa. 218; *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108.

<sup>4</sup> *Bloomer v. Bernstein*, Law Rep. 9 C. P. 588; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Morgan v. Bain*, Law Rep. 10 C. P. 15; *Suber v. Pullin*, 1 S. C. 273.

<sup>5</sup> *Brinley v. Tibbets*, 7 Greenl. 70; *Pratt v. Philbrook*, 41 Maine, 132; *Akerly v. Vilas*, 21 Wis. 88; *ante*, 206, 656, 658.

§ 679. **Statu Quo.**—The party rescinding must return the consideration or whatever else he has received under the contract, and otherwise do what will put him and the other party *in statu quo*, as already explained;<sup>1</sup> and, if he cannot do this,—as, if he has derived some benefit from the contract, not of a sort to be refunded,—he cannot rescind.<sup>2</sup>

§ 680. **Recover back.**—If the case is one permitting rescission, and it has been lawfully made, by the party not in fault,—or, unlawfully, by the other party,—the former may recover back from the latter the consideration, or whatever else he has paid on the contract; including compensation for work done, goods delivered, and the like, prior to the rescission.<sup>3</sup> But—

§ 681. **By Party in Fault.**—A party abandoning his contract without justification,<sup>4</sup> or for whose fault the other has lawfully rescinded it, stands in a different position. Strictly, he can recover nothing; because he does not come

<sup>1</sup> *Ante* § 203, 676; *California Steam Nav. Co. v. Wright*, 8 Cal. 585; *Jennings v. Gage*, 13 Ill. 610; *Tisdale v. Buckmore*, 33 Maine, 461; *Conner v. Henderson*, 15 Mass. 319; *Brown v. Witter*, 10 Ohio, 142; *Croft v. Wilbar*, 7 Allen, 248.

<sup>2</sup> *Barber v. Lyon*, 8 Blackf. 215; *Barnett v. Stanton*, 2 Ala. 181; *Desha v. Robinson*, 17 Ark. 228; *Moore v. Bare*, 11 Iowa, 198; *Burge v. Cedar Rapids, etc., Railroad*, 32 Iowa, 101.

<sup>3</sup> *Brown v. Mahurin*, 39 N. H. 156; *Drew v. Claggett*, 39 N. H. 481; *Sherburne v. Fuller*, 5 Mass. 133, 139; *Kidder v. Hunt*, 1 Pick. 328; *Crossgrove v. Himmelrich*, 4 Smith, Pa. 203; *Fitch v. Casey*, 2 Greene, Iowa, 300; *Dill v. Wanham*, 7 Met. 438; *Randlet v. Herren*, 20 N. H. 102; *Nash v. Towne*, 5 Wal. 689; *Weatherly v. Higgins*, 6 Ind. 78; *Hickock v. Hoyt*, 33 Conn. 558; *Earle v. Bickford*, 6 Allen, 549; *Byers v. Bostwick*, 2 Mill, 75; *Kimball v. Cunningham*, 4 Mass. 504; *Dubois v. Delaware, etc., Canal*, 4 Wend. 285; *Barickman v. Kuykendall*, 6 Blackf. 22; *Butts v. Huntley*, 1 Scam. 410; *Chamberlin v. Scott*, 33 Vt. 80; *Canada v. Canada*, 6 Cush. 15; *Feay v. Decamp*, 15 S. & R. 227; *Martin v. Eames*, 26 Vt. 476; *Bayliss v. Prichture*, 24 Wis. 651.

<sup>4</sup> *Haslack v. Mayers*, 2 Dutcher, 284; *Plummer v. Bucknam*, 55 Maine, 105; *Wooten v. Read*, 2 Sm. & M. 585; *Olmstead v. Beale*, 19 Pick. 528; *Rounds v. Baxter*, 4 Greenl. 454; *Faxon v. Mansfield*, 2 Mass. 147; *Ketchum v. Evertson*, 18 Johns. 359, 365; *Clark v. School District in Pawlet*, 29 Vt. 217; *Larkin v. Buck*, 11 Ohio State, 561; *Robinson v. Raynor*, 28 N. Y. 494.

into court, as the phrase is, with "clean hands."<sup>1</sup> Yet, in various exceptional circumstances, in spite of this general rule, the other party, who has accepted from him a benefit, must pay for it, though not in fault, and though he who is demanding payment is in the wrong. The limits of this exception are not at all points well defined, and the adjudications are in some measure conflicting; so that the practitioner should carefully examine the decisions in his own State, as he would the statutes, and on this ground tread with caution.<sup>2</sup> We have seen,<sup>3</sup> that, in some circumstances, the party in the wrong has a protection in the rule which requires the rescinding party to refund the consideration.

### III. *Wrongfully, by one Party, without the other's Fault or Consent.*

**§ 682. Power of the one Party.**—It is a proposition sound in principle, and sufficiently supported by authority, though more or less may be found in the books against it, that one party alone, with no consent from the other, who is in no fault, has, at law, the power—not to be exercised without liability for damages, but still the power—to rescind any executory contract. If this were not so, one might be ruined by an undertaking of which a change in circumstances rendered the performance highly inexpedient or practically impossible.<sup>4</sup> Thus,—

<sup>1</sup> See post, § 688.

<sup>2</sup> *Cardell v. Bridge*, 9 Allen, 355; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Hariston v. Sale*, 6 Sm. & M. 684; *Clayton v. Blake*, 4 Ire. 497; *Britton v. Turner*, 6 N. H. 481; *Downey v. Burke*, 23 Misso. 228; *Carroll v. Welch*, 26 Texas, 147; *Pixel v. Nichols*, 8 Iowa, 106; *Patrick v. Putnam*, 27 Vt. 759; *Cahill v. Patterson*, 30 Vt. 592; *Veazie v. Hosmer*, 11 Gray, 396; *Hartwell v. Jewett*, 9 N. H. 249; *Byerlee v. Mendel*, 39 Iowa, 382; *Goodwin v. Merrill*, 18 Wis. 658; *Wade v. Haycock*, 1 Casey, Pa. 382; *Lomax v. Bailey*, 7 Blackf. 599.

<sup>3</sup> *Ante*, § 679.

<sup>4</sup> See cases cited to the next two sections; also *New Orleans v. Church of St. Louis*, 11 La. An. 244.

**§ 683. Services for Specified Time.**—If one employs another for an agreed period, but turns him off before the time has expired, the latter may recover damages for this breach of contract,<sup>1</sup>—or, accepting the unauthorized rescission, for what the work is worth,<sup>2</sup>—yet he cannot lie by and refuse other employment, and compel payment as though the full services were rendered.<sup>3</sup>

**§ 684. Duty of Party not in Fault.**—One who receives from the other party to a contract notice of its rescission, is, while entitled to damages if the notice proceeds only from such party's pleasure or necessities, still not justifiable in allowing anything further to be done to bring needless expense. He is even to take affirmative action, if the interests growing out of the rescinded contract so require.<sup>4</sup>

**§ 685. Specific Performance.**—The doctrines of this sub-title are to some degree modified in courts of equity, where, in some circumstances, as to some contracts, not all, a specific performance of the thing agreed is enforced.<sup>5</sup>

**§ 686. *The Doctrine of this Chapter restated.***

By mutual consent, persons who have made a contract can unmake it; but one party, without the concurrence of the other, cannot undo what it required two to do. One

<sup>1</sup> *Nations v. Cudd*, 22 Texas, 550; *Fowler v. Armour*, 24 Ala. 194; *Davis v. Ayres*, 9 Ala. 292; *Miller v. Goddard*, 34 Maine, 102.

<sup>2</sup> *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Britt v. Hays*, 21 Ga. 157; *Rogers v. Parham*, 8 Ga. 190. And see *Moulton v. Trask*, 9 Met. 577.

<sup>3</sup> *Ricks v. Yates*, 5 Ind. 115; *Prichard v. Martin*, 27 Missis. 305; *Sherman v. Champlain Transp. Co.*, *supra*; *Walworth v. Pool*, 4 Eng. 394; *King v. Steiren*, 8 Wright, Pa. 99; *Jones v. Jones*, 2 Swan, Tenn. 605; *Costigan v. Mohawk, etc.*, Railroad, 2 Denio, 609; *McDaniel v. Parks*, 19 Ark. 671; *Children of Israel v. Peres*, 2 Coldw. 620. This I understand to be established doctrine, yet it is not recognized in all the cases. See, on this question, besides the above cases, *Bradshaw v. Branan*, 5 Rich. 465; *Cox v. Adams*, 1 Nott & McC. 284; *Webster v. Wade*, 19 Cal. 291; *Britt v. Hays*, 21 Ga. 157; *Colburn v. Woodworth*, 31 Barb. 381; *Byrd v. Boyd*, 4 McCord, 246.

<sup>4</sup> *Dillon v. Anderson*, 43 N. Y. 231.

<sup>5</sup> 1 Story Eq. § 712-793.

party alone, however, can break a contract, by becoming disqualified to perform it, or by refusing. And, though some of the cases seem to hold that, after such refusal or disqualification, and even after notice to the other party that the contract will not be performed, the latter may elect to treat it as continuing, this is contrary to sound reason, to natural justice, and the better adjudications. At law, if a man has broken his agreement, he will be liable to the other party to the extent of what has been suffered, and no more. In equity, there are circumstances in which a specific performance may properly be, and is, enforced.

When one party has broken his contract without the other's fault, the latter may sue the former for the damages suffered; or, if the parties can be placed *in statu quo*, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The pursuing of the latter alternative is called a rescinding of the contract.

## CHAPTER XXXVI.

## THE BREACH AND PERFORMANCE OF CONTRACTS.

§ 687. **Distinctions — What for this Chapter.** — In the last chapter, we saw that there may be rights growing indirectly out of a contract which the parties have rescinded, or which is rescinded by the one seeking their enforcement. They are not for consideration in this chapter. Again, in preceding chapters, we have seen that while a contract is in progress of fulfilment it may be varied by the parties ; so that what is done is not strictly under the original undertaking, but under a new one. In such a case, the new contract<sup>1</sup> is the one for contemplation here. The breach and performance, therefore, to be here discussed, are such as take place under a contract, new or old, which the parties treat as subsisting.

§ 688. **Elements justifying Suit.** — Two elements are essential in every sort of lawsuit by a private person against another ; namely, a right in the plaintiff, and a correlative wrong in the defendant. And the plaintiff must be without fault in the thing of which he complains, and the defendant must be in fault.<sup>2</sup> This, therefore, is the rule in actions upon contracts, — there must be a performance<sup>3</sup> or readiness to perform,<sup>4</sup> as the particular contract may require, by the plaintiff, and a breach by the defendant.

<sup>1</sup> *Hughes v. Prewitt*, 5 Texas, 264.

<sup>2</sup> 1 Bishop Crim. Law, § 11; 2 Bishop Mar. & Div., § 75.

<sup>3</sup> *Long v. Hartwell*, 5 Vroom, 116; *Allen v. Atkinson*, 21 Mich. 351; *Brown v. Fitch*, 4 Vroom, 418; *Pullman v. Corning*, 5 Selden, 93.

<sup>4</sup> *Noble v. Edwards*, 5 Ch. D. 378, 393; *Hapgood v. Shaw*, 105 Mass. 276;

§ 689. **Inability or Refusal.** — A common breach is where one is unable or declines to go on with his contract;<sup>1</sup> or, where, after the other party has performed, he cannot or will not pay the agreed price.<sup>2</sup> Again, —

§ 690. **Disqualify Self.** — If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived.<sup>3</sup> Or, —

§ 691. **Disqualified when Contract made.** — If, when he makes a contract, he is, unknown to the other party, disqualified to fulfil it, the breach is simultaneous with the promise, and he may be sued immediately.<sup>4</sup> In like manner, —

§ 692. **Wrongful Rescinding — Refusal absolute.** — When a party exercises the power, already spoken of,<sup>5</sup> to rescind his contract without right, — that is, declares to the other party his intention not to abide by it, — this is a breach on which the other may bring an immediate suit, without demanding performance, though by the terms of the contract the performance was to be in the future.<sup>6</sup> To illustrate, —

*Carpenter v. Holcomb*, 105 Mass. 280; *Bradford v. Williams*, Law Rep., 7 Ex. 459; *Smith v. Lewis*, 24 Conn. 624; *Seymour v. Bennet*, 14 Mass. 266, 268.

<sup>1</sup> *Ante*, § 682-684; *Thompson v. Laing*, 8 Bosw. 482; *Davis v. Crawford*, 2 *Mill*, 401.

<sup>2</sup> *Shackelford v. Barrow*, 2 Bay, 91.

<sup>3</sup> *Ante*, § 677; *Boyle v. Guysiger*, 12 Ind. 473; *Dalamater v. Miller*, 1 *Cow.* 75; *Lovering v. Lovering*, 13 N. H. 513; *Webster v. Coffin*, 14 Mass. 196; *Cooper v. Mowry*, 17 Mass. 5, 7; *Bassett v. Bassett*, 55 Maine, 127; *Smith v. Jordan*, 18 Minn. 264; *Crist v. Armour*, 34 Barb. 378. See *McDonald v. Williams*, 1 *Hilton*, 365.

<sup>4</sup> *Post*, § 698; *Woods v. North*, 6 *Humph.* 309; *Harrington v. Wells*, 12 *Vt.* 505.

<sup>5</sup> *Ante*, § 682.

<sup>6</sup> *Frost v. Knight*, Law Rep. 7 Ex. 111; *Holloway v. Griffith*, 32 Iowa, 409; *Bunge v. Koop*, 48 N. Y. 225; *Crabtree v. Messersmith*, 19 Iowa, 179. If, however, the disability is involuntary, it will not be deemed a breach until the time for performance arrives. *Heard v. Bowers*, 23 *Pick.* 455.

**§ 693. Breach of Marriage Promise.**—If parties are engaged to be married, and it turns out that one of them was, at the time of the engagement, under the disabilities of a prior marriage,<sup>1</sup>—or, if one marries afterward another person,<sup>2</sup>—or breaks off the engagement before the time for its fulfilment,<sup>3</sup>—the party not in the wrong may immediately sue the other for the breach of promise. Or,—

**§ 694. Make Conveyance.**—The agreement being that the one party shall convey lands or goods to the other, if the former parts with them to a third person or destroys the goods, the latter may sue him without waiting for the contract time to elapse, and without demanding the conveyance.<sup>4</sup>

**§ 695. Hindering or Preventing Performance.**—For the like reason, a party who prevents the other from performing the contract, or hinders him therein, violates it. And the doctrine, which is sound in some circumstances, is often laid down quite broadly, that the one who prevents fulfilment by the other must pay the same as though it were fulfilled.<sup>5</sup> Also, if performance is a condition precedent, he who prevents it waives the condition.<sup>6</sup> Even a mere

<sup>1</sup> *Blattmacher v. Saal*, 29 Barb. 22. If the disability is known to both parties, the promise is void, and no action will lie. *Haviland v. Halstead*, 34 N. Y. 643. For an explanation of this distinction, see *ante*, § 336-339. And see *Blossom v. Barrett*, 37 N. Y. 434.

<sup>2</sup> *Short v. Stone*, 8 Q. B. 358; *King v. Kersey*, 2 Ind. 402; *Clements v. Moore*, 11 Ala. 35.

<sup>3</sup> *Foster v. Knight*, Law Rep. 7 Ex. 111; *Holloway v. Griffith*, 32 Iowa, 409; *Burtis v. Thompson*, 42 N. Y. 246. See *Coil v. Wallace*, 4 Zab. 291.

<sup>4</sup> *Newcomb v. Brackett*, 16 Mass. 161; *Heard v. Bowers*, 23 Pick. 455, 460; *Griffith v. Goodhand*, T. Jones, 191; *Hopkins v. Young*, 11 Mass. 302, 306.

<sup>5</sup> *Majors v. Hickman*, 2 Bibb, 217; *Carrell v. Collins*, 2 Bibb, 429; *Marshall v. Craig*, 1 Bibb, 379. See *Blood v. Enos*, 12 Vt. 625; *Devlin v. Second Avenue Railroad*, 44 Barb. 81; *Wallman v. Society of Concord*, 45 N. Y. 485; *St. Louis v. McDonald*, 10 Misso. 609.

<sup>6</sup> *Dodge v. Rogers*, 9 Minn. 223; *Jones v. Walker*, 13 B. Monr. 163; *Camp v. Barker*, 21 Vt. 469; *Williams v. United States Bank*, 2 Pet. 96, 102.

hindrance may be a waiver as to time.<sup>1</sup> And plainly one cannot maintain a suit against another for not doing what he put it out of the other's power to do.<sup>2</sup> But—

§ 696. **Limits of the Doctrine.**—This doctrine cannot properly be carried so far as to work palpable injustice. It needs no argument to show, that, if a man who had promised to pay for a thousand bushels of wheat on delivery, should refuse to accept it, he could not be made to pay the entire agreed sum, and the other party be permitted to keep his wheat. Or, if one was to have ten thousand dollars for building a house on another's land, the latter, on ordering him off the premises, could not be compelled to pay the whole ten thousand dollars with no benefit conferred.<sup>3</sup> The true doctrine, in such a case, has, it is believed, been stated in a previous chapter.<sup>4</sup>

§ 697. **Simultaneous Acts.**—If, by the terms of the contract, or its legal construction, the acts of the parties are to be simultaneous,—as, for example, if one is to convey land to the other who is to pay for it,—neither can maintain a suit against the other until he has done his part, or offered to do it on performance by the other; and, in some circumstances, or according to some of the authorities, performance by the other must also be demanded.<sup>5</sup> On principle, a tender of the deed, money, or other thing, and

<sup>1</sup> *Ketchum v. Zeilsdorff*, 26 Wis. 514.

<sup>2</sup> *Stewart v. Keteltas*, 36 N. Y. 388; *McKee v. Miller*, 4 Blackf. 222; *Parker Vein Coal Co. v. O'Hern*, 8 Md. 197; *Gibson v. Dunnam*, 1 Hill, S. C. 289; 2 Chit. Con. 11th Am. ed. 1087.

<sup>3</sup> See, and query, *Clendennen v. Paulsel*, 3 Misso. 230.

<sup>4</sup> *Ante*, § 682-684.

<sup>5</sup> *Fuller v. Hubbard*, 6 Cow. 13; *Ishmael v. Parker*, 13 Ill. 324; *Small v. Reeves*, 14 Ind. 163; *Fuller v. Smith*, 7 Cow. 53; *Kane v. Hood*, 13 Pick. 281; *Runkle v. Johnson*, 30 Ill. 328; *Stokes v. Burrell*, 3 Grant, Pa. 241; *Dana v. King*, 2 Pick. 155; *Brown v. Gammon*, 14 Maine, 276; *Howe v. Huntington*, 15 Maine, 350; *Hunt v. Livermore*, 5 Pick. 395; *Perry v. Wheeler*, 24 Vt. 286; *Savage Manuf. Co. v. Armstrong*, 19 Maine, 147; *Leaird v. Smith*, 44 N. Y. 618.

the keeping of the tender good, should be deemed enough; unless, from the nature of the thing to be done by the other party, time is required, and then the needful time should be offered also.<sup>1</sup>

§ 698. **Every Step.** — In more general terms, when, on the one side, every step which the contract requires on that side before something is done on the other has been taken, the party of the other side breaks it if he simply neglects to take his step, though no demand on him is made; but, while any thing, however slight, remains unperformed by the former party, there is no breach by the latter.<sup>2</sup> Thus,—

§ 699. **Pay in Specific Articles.** — Where one promises another to pay him a sum in such specific articles, or in specific articles at such a time or place, as the latter may determine, or at an indefinite time, the promisee must take the first step, until which the promisor has no occasion to make a tender, and is not suable.<sup>3</sup> These conditions attend most contracts in the form of promissory notes payable in specific articles; whence it has become a sort of general rule that such a note does not become payable in money, and the foundation of a suit, until there have been a demand and refusal.<sup>4</sup> But the note is sometimes so drawn as not to be

<sup>1</sup> See *Gushee v. Eddy*, 11 Gray, 502, 503; *Cobb v. Hall*, 33 Vt. 233; *Biggers v. Pace*, 5 Ga. 171; *Hammond v. Gilmore*, 14 Conn. 479.

<sup>2</sup> *Adams v. New York*, 4 Duer, 295; *Helm v. Wilson*, 4 Misso. 41; *Burke v. Wells*, 50 Cal. 218; *Watson v. Walker*, 3 Fost. N. H. 471; *Brewer v. Tysor*, 8 Jones, N. C. 180; *Wagenblast v. McKeon*, 2 Grant, Pa. 398; *Downer v. Frizzle*, 10 Vt. 541; *McCarren v. McNulty*, 7 Gray, 189; *Pratt v. Law*, 9 Cranch, 456; *Bersch v. Sander*, 37 Misso. 104; *Niblett v. Herring*, 4 Jones, N. C. 262; *Bishop v. Newton*, 20 Ill. 175; *Abbott v. Gatch*, 13 Md. 314; *Noble v. James*, 2 Grant, Pa. 278; *Hill v. Smith*, 32 Vt. 433.

<sup>3</sup> *Baker v. Stoughton*, 1 Oregon, 227; *Corbitt v. Stonemetz*, 15 Wis. 170; *Newton v. Wales*, 3 Rob. N. Y. 453; *Hambel v. Tower*, 14 Iowa, 530; *Wear v. Jacksonville*, etc., *Railroad*, 24 Ill. 593; *Morey v. Enke*, 5 Minn. 392. But see *Bixby v. Whitney*, 5 Greenl. 192.

<sup>4</sup> *Greenwood v. Curtis*, 6 Mass. 358, 364; *Smith v. Leavensworth*, 1 Root, 209; *Dean v. Woodbridge*, 1 Root, 191; *Johnson v. Baird*, 3 Blackf. 153; *Stevens v. Adams*, 45 Maine, 611; *Lobdell v. Hopkins*, 5 Cow. 516; *Dunn v.*

within this principle, and then an action without demand may be sustained on it, when the time of payment has elapsed, unless the defendant has duly tendered the articles.<sup>1</sup> The adjudged cases on this question are not uniformly consistent with one another.

§ 700. **Pay Money**—(“**On Demand**”).—If, without qualification, one promises to pay money to another, either generally<sup>2</sup> or “on demand,”<sup>3</sup> the money becomes due simultaneously with the promise, — or, if the payment is to be on a future day, it becomes due then, — and, in either case, there being nothing for the promisee to do, the promisor must find him<sup>4</sup> if within the State,<sup>5</sup> and tender him the money; in default whereof a suit may be maintained against him, and no demand in fact is necessary.<sup>6</sup>

**Marston**, 34 Maine, 379; **Chandler v. Windship**, 6 Mass. 310; **Wilmouth v. Patton**, 2 Bibb, 280; **Chambers v. Winn**, Pr. Dec. 2d ed. 166; **Gushee v. Eddy**, 11 Gray, 502. But see **Cobb v. Reed**, 2 Stew. 444.

<sup>1</sup> **Bernard v. Bernard**, 1 Lev. 289; **Marshall v. Ferguson**, 23 Cal. 65; **Wheeler v. Garsia**, 5 Rob. N. Y. 280; **Stewart v. Morrow**, 1 Grant, Pa. 204; **Wiley v. Shoemak**, 2 Green, Iowa, 205; **Plowman v. Riddle**, 7 Ala. 775; **Miller v. McClain**, 10 Yerg. 245; **Vanhooser v. Logan**, 3 Scam. 389; **Hardeman v. Cowan**, 10 Sm. & M. 486; **Deal v. Berry**, 21 Texas, 463; **Perry v. Smith**, 22 Vt. 301; **Fleming v. Pottar**, 7 Watts, 380; **Orr v. Williams**, 5 Humph. 428; **Peck v. Hubbard**, 11 Vt. 612; **Chambers v. Harger**, 6 Harris, Pa. 15.

<sup>2</sup> **Purdy v. Phillips**, 1 Duer, 369; **Payne v. Mattox**, 1 Bibb, 164; **Thompson v. Ketcham**, 8 Johns. 189; **Columbia Bank v. Hagner**, 1 Pet. 455; **Bailey v. Clay**, 4 Rand. 346.

<sup>3</sup> **Saund. Wms. ed.** 63 *d*, note; **Omohundro v. Omohundro**, 21 Grat. 626; **Capp v. Lancaster**, Cro. Eliz. 548; **Cotton v. Reavill**, 2 Bibb, 99; **Pullen v. Chase**, 4 Pike, 210; **Thomson v. Butler**, Cro. Eliz. 721; **Kingsbury v. Butler**, 4 Vt. 458; **Brett v. Ming**, 1 Fla. 447. The distinction in the books is, that, “where a mere duty is promised to be paid upon request, there needs no actual request; but, where a collateral sum is promised to be paid upon request, there must be an actual request.” **Birks v. Trippet**, 1 Saund. Wms. ed. 32, 33 *b*. And see **Blackwell v. Fosters**, 1 Met. Ky. 88.

<sup>4</sup> **Kidwelly v. Brand**, Plow. 69, 71; **Sage v. Ranney**, 2 Wend. 582; **Sanders v. Norton**, 4 T. B. Monr. 464; **Pomeroy v. Ainsworth**, 22 Barb. 119.

<sup>5</sup> **Co. Lit.** 210 *b*; **2 Chit. Con.** 11th Am. ed. 1069; **Littell v. Nichols, Hardin**, 2d ed. 71; **Gill v. Bradley**, 21 Minn. 15.

<sup>6</sup> **Langston v. South Carolina Railroad**, 2 S. C. 248; **O'Connor v. Dingley**, 26 Cal. 11; **McDonald v. Gray**, 11 Iowa, 508; **Wheeler v. Garsia**, 5 Rob. N. Y. 280. And see **Trinity Church v. Higgins**, 48 N. Y. 532.

§ 701. **Payable Sunday.** — The rule is familiar, that, where a bill or note having days of grace falls due, grace included, on Sunday, it is payable on Saturday.<sup>1</sup> But in ordinary contracts, where the element of grace is not recognized, the rule, by most opinions, is reversed; Sunday is not counted, and the performance or breach takes place on Monday,<sup>2</sup> though some courts hold Saturday to be the day.<sup>3</sup>

§ 702. **When Suit.** — To maintain any suit at law, there must be a consummated cause of action when it is commenced.<sup>4</sup> And one who is to pay money or do anything else on a particular day, has the whole day to do it in; so that a suit for the breach cannot be instituted till the next day.<sup>5</sup> Negotiable paper furnishes a partial exception to this rule; for, if payment is demanded at a reasonable hour on the last day of grace, and refused, an action may then be commenced; though, without such demand, it cannot be.<sup>6</sup> This exception does not extend to money promised on any other sort of contract.<sup>7</sup>

§ 703. *The Doctrine of this Chapter restated.*

If a party is simply unable to perform his contract, — as, if he has not the money to pay, and has no means of getting it, — this does not constitute a breach, justifying a suit by the other party, until the time to perform, specified in the contract, has elapsed. Inability to do a thing to-day is not the

<sup>1</sup> *Farnum v. Fowle*, 12 Mass. 89; *Barlow v. Planters' Bank*, 7 How. Missis. 129; *Sanders v. Ochiltree*, 5 Port. 73; *Sheppard v. Spates*, 4 Md. 400.

<sup>2</sup> *Salter v. Burt*, 20 Wend. 205; *Stryker v. Vanderbilt*, 3 Dutcher, 68; *Stebbins v. Leowolf*, 3 Cush. 137; *Carothers v. Wheeler*, 1 Oregon, 194.

<sup>3</sup> *Kilgour v. Miles*, 6 Gill & J. 268.

<sup>4</sup> *Wadley v. Jones*, 55 Ga. 329; *Nickerson v. Babcock*, 29 Ill. 497; *Blevins v. Alexander*, 4 Sneed, Tenn. 583.

<sup>5</sup> *Estes v. Tower*, 102 Mass. 65; *Davis v. Eppinger*, 18 Cal. 378; *Thomas v. Shoemaker*, 6 Watts & S. 179.

<sup>6</sup> *Greeley v. Thurston*, 4 Greenl. 479; *Estes v. Tower*, *supra*; *Ammidown v. Woodman*, 31 Maine, 580.

<sup>7</sup> *Harris v. Blen*, 16 Maine, 175.

sort of demonstration which the law requires of inability to do it to-morrow. But, if one agrees to do what he has not the legal capacity to perform, and the other party is not a partaker with him in the attempt to violate the law,—or if, having the capacity at the time, he afterward does what takes away the capacity,—or, if he puts the thing contracted about beyond his control, so that his inability to perform at the appointed time is now demonstrated in matter of fact,—or, if he signifies to the other party that he will not fulfil his agreement,—in any one of these cases, a breach is committed, and an action may be maintained on behalf of the other party, though the contract time has not arrived. In the ordinary case, as just stated, the full period specified by the contract for taking the particular step, a failure in which is alleged as the breach, must have elapsed; and the suit cannot be commenced until the day after the day of performance. Where the acts are to be simultaneous, so that one party is in equal default with the other when they are not done, neither can maintain a suit till he has taken some step which puts him in the right and the other in the wrong.

## CHAPTER XXXVII.

## THIRD PERSONS.

§ 704. **In General.** — Persons who are not parties to a contract have generally no concern with it, and it has none with them. Each is as though the other were not. But, in the intimate relations which men sometimes sustain to one another, it may be possible for two, in their transactions, to injure a third; and then, if the injury has proceeded far enough, the law will interfere. Or, a third may assume to act, without authority, for one or both of the parties; and, out of this, rights may grow. Thus,—

§ 705. **Paying supra Protest.** — One who accepts and then pays, or pays without accepting, *supra protest*, a dishonored bill of exchange, has his remedy over against the drawer or other party for whose honor he interposed, though he was not requested, and was not the agent of such party.<sup>1</sup> But this is a peculiarity of the law-merchant.

§ 706. **Otherwise paying another's Debt.** — In all other contracts, one cannot make another his debtor by paying unauthorized the latter's debt.<sup>2</sup> At the same time, if the

<sup>1</sup> 3 Kent Com. 87; Bayley Bills, 5th Eng. ed. 178, 325, 326; Byles Bills, 150-154; Leake *v.* Burgess, 18 La. An. 156.

<sup>2</sup> South Scituate *v.* Hanover, 9 Gray, 420; Junkins *v.* Union School District, 39 Maine, 220; Bancroft *v.* Abbott, 3 Allen, 524; Little *v.* Gibbs, 1 Southard, 211; Jones *v.* Wilson, 3 Johns. 434; Menderback *v.* Hopkins, 8 Johns. 436; Munroe *v.* Easton, 2 Johns. Cas. 75; Beach *v.* Vandenburg, 10 Johns. 361; Richardson *v.* Williams, 49 Maine, 558; Woodford *v.* Leavenworth, 14 Ind. 311; Oden *v.* Elliott, 10 B. Monr. 313; Winsor *v.* Savage, 9 Met. 346; Lewis *v.* Lewis, 3 Strob. 530; Blanchard *v.* First Association of Spiritualists, 59 Maine, 202.

payment is accepted by the creditor in discharge of the debt, it has that effect in law.<sup>1</sup> The doctrine seems to be, that this is a gift from the person paying to the debtor.

§ 707. *Ratification of Unauthorized Contract:* —

**Makes it good.** — But, in this and all other cases wherein one does an unauthorized act for another, if he claims to be the agent of the other, and the act is in a form which would bind the principal were he truly agent, the assumed principal may ratify it, and then it will have the same effect as if the authority had been given in advance.<sup>2</sup> If not performed by the agent as agent, it will not bind the principal; for a ratification cannot do what a previous authority could not.<sup>3</sup> Hence, also, a principal cannot ratify an act which he was not himself competent to do when it was done.<sup>4</sup>

§ 708. **With Knowledge.** — For a ratification to be effectual, it must be either with full knowledge of what has been done;<sup>5</sup> “or,” in the words of Willes, J., “with intention to adopt it at all events and under whatever circumstances;”<sup>6</sup>

<sup>1</sup> *Martin v. Quinn*, 37 Cal. 55. In matter of mere pleading, it is said that accord and satisfaction, where the satisfaction is laid as from a stranger, is not good. *Edgcombe v. Rodd*, 5 East, 294; *Clow v. Borst*, 6 Johns. 37; *Grymes v. Blofield*, Cro. Eliz. 541; *Daniels v. Hallenbeck*, 19 Wend. 408; *Stark v. Thompson*, 3 T. B. Monr. 296, 302. As to which, and supporting the text, see 2 Chit. Con. 11th Am. ed. 1133.

<sup>2</sup> *Grant v. Beard*, 50 N. H. 129; *Ryan v. Doyle*, 31 Iowa, 53; *Bronson v. Chappell*, 12 Wal. 681; *Dresser v. Wood*, 15 Kan. 344; *Workman v. Campbell*, 57 Misso. 53; *Bryan v. Robert*, 1 Strob. Eq. 334; *Hammond v. Hannin*, 21 Mich. 374; *Wright v. Burbank*, 14 Smith, Pa. 247; *Williams v. Butler*, 35 Ill. 544; *McIntyre v. Park*, 11 Gray, 102; *Bragg v. Fessenden*, 11 Ill. 544. But vested rights of third persons will not be divested. *Wood v. McCain*, 7 Ala. 800; *Taylor v. Robinson*, 14 Cal. 396; *Fiske v. Holmes*, 41 Maine, 441.

<sup>3</sup> *Collins v. Suau*, 7 Rob. N. Y. 623; *Commercial, etc., Bank v. Jones*, 18 Texas, 811.

<sup>4</sup> *McCracken v. San Francisco*, 16 Cal. 591; *Ashbury Railway, etc., Co. v. Riche*, Law Rep. 7 H. L. 653, 674, 679.

<sup>5</sup> *Rowan v. Hyatt*, 45 N. Y. 138; *Clarke v. Lyon*, 7 Nev. 75; *Bray v. Gunn*, 53 Ga. 144; *Owings v. Hull*, 9 Pet. 607; *Dickinson v. Conway*, 12 Allen, 487; *Pittsburgh, etc., Railroad v. Gazzam*, 8 Casey, Pa. 340; *ante*, § 658.

<sup>6</sup> *Phosphate of Lime Co. v. Green*, Law Rep. 7 C. P. 43, 57.

lacking which, it may be avoided, at least to the extent of the misapprehension.<sup>1</sup> So,—

§ 709. **In Full.**—In the absence of any consent by the other party, the ratification must be of the entire unauthorized act or of none.<sup>2</sup> Even,—

§ 710. **Fraud.**—If the act of the unauthorized person was fraudulent, the ratification extends to the fraud, binding the ratifier to its consequences.<sup>3</sup>

§ 711. **How Ratify.**—The methods of ratification are multitudinous. One method is by express authority to do the thing, in terms as though it had not been done.<sup>4</sup> Another is by accepting and using the avails of the assumed agency ;<sup>5</sup> or by any other conduct, involving rights and interests, based on the existence of the assumed agency, and inconsistent with its non-existence.<sup>6</sup> Hence, bringing a suit on the unauthorized contract is a ratification ;<sup>7</sup> and such, in some circumstances, is the consequence of a neglect to repudiate the agent's act.<sup>8</sup>

<sup>1</sup> *Miller v. Sacramento*, 44 Cal. 166.

<sup>2</sup> *Southern Express v. Palmer*, 48 Ga. 85; *Crawford v. Barkley*, 18 Ala. 270; *Henderson v. Cummings*, 44 Ill. 325; *Widner v. Lane*, 14 Mich. 124; *Coleman v. Stark*, 1 Oregon, 115. See *Bangor Boom Corp. v. Whiting*, 29 Maine, 123.

<sup>3</sup> *Crans v. Hunter*, 28 N. Y. 389; *Law v. Grant*, 37 Wis. 548. See *Brook v. Hook*, *Law Rep.* 6 Ex. 89.

<sup>4</sup> *Rice v. McLarren*, 42 Maine, 157.

<sup>5</sup> *Ketchum v. Verdell*, 42 Ga. 534; *Lyman v. Norwich University*, 28 Vt. 560.

<sup>6</sup> *Maddux v. Bevan*, 39 Md. 485; *Hankins v. Baker*, 46 N. Y. 666; *Doughaday v. Crowell*, 3 Stock. 201; *Skinner v. Dayton*, 19 Johns. 513; *Perkins v. Missouri, etc., Railroad*, 55 Misso. 201. See *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *White v. Sanders*, 32 Maine, 188.

<sup>7</sup> *Beloit Bank v. Beale*, 34 N. Y. 473; *Sutton v. Cole*, 3 Pick. 232; *Dodge v. Lambert*, 2 Bosw. 570; *Hampshire v. Franklin*, 16 Mass. 76, 87; *Corser v. Paul*, 41 N. H. 24; *Franklin v. Ezell*, 1 Sneed, Tenn. 497; *Walker v. Mobile, etc., Railroad*, 34 Missis. 245. See *St. Mary's Bank v. Calder*, 3 Strob. 403.

<sup>8</sup> *Brigham v. Peters*, 1 Gray, 139; *Lindsley v. Malone*, 11 Harris, Pa. 24; *Bray v. Gunn*, 53 Ga. 144; *Ward v. Williams*, 26 Ill. 447; *Law v. Cross*, 1 Black, 533; *Owsley v. Woolhopter*, 14 Ga. 124. See *Clarke v. Meigs*, 10 Bosw. 387; *Reese v. Medlock*, 27 Texas, 120.

§ 712. *Conveyances to defraud Creditors: —*

**Between the Parties.** — If two persons conspire to cheat a third, or the creditors of one of them, this conspiracy may be even indictable ;<sup>1</sup> and, whether in a particular instance it is or not, it is against good morals and the policy of the law. Therefore a court will not enforce it.<sup>2</sup> On this principle, where one conspirator conveys goods to another to defraud the former's creditors, neither the goods can be reclaimed nor can an executory promise to pay for them be enforced ; but, the parties being equally in the wrong, the law will not interpose to assist either.<sup>3</sup> By some courts, however, this doctrine is qualified to the extent, that, as the creditors alone are entitled to complain, while they acquiesce, the contract, whether executory or executed, will be deemed good between the parties.<sup>4</sup> The latter view is supported by reasoning of considerable strength, and perhaps by the greater number of adjudged cases.<sup>5</sup> It practically concerns only executory promises. By either view, the executed conveyance is good as between the parties.<sup>6</sup>

**§ 713. As to the Creditor.** — A creditor may always avoid a conveyance which his debtor has made to a co-conspirator, to cheat him.<sup>7</sup> Such is the doctrine of the common law, and it is confirmed, if not extended, by the —

<sup>1</sup> 2 Bishop Crim. Law, § 185, 198-214.

<sup>2</sup> *Ante*, § 457 et seq. ; 480.

<sup>3</sup> *Ante*, § 348 ; *Ager v. Duncan*, 50 Cal. 325 ; *Heineman v. Newman*, 55 Ga. 262 ; *Harwood v. Knapper*, 50 Misso. 456 ; *Burleigh v. White*, 64 Maine, 23.

<sup>4</sup> *Harvey v. Varney*, 98 Mass. 118 ; *Van Wy v. Clark*, 50 Ind. 259 ; *Dietrich v. Koch*, 35 Wis. 618 ; *Roberts v. Lund*, 45 Vt. 82 ; *Hess v. Final*, 32 Mich. 515. And see *Noble v. Noble*, 26 Ark. 317.

<sup>5</sup> I have not deemed it necessary to refer to any considerable proportion of the numerous cases, as the reader will necessarily consult those of his own State.

<sup>6</sup> And see *Fivaz v. Nicholls*, 2 C. B. 501 ; *Begbie v. Phosphate Sewage Co.*, Law Rep. 10 Q. B. 491, 499, 500.

<sup>7</sup> *Lowry v. Pinson*, 2 Bailey, 324 ; *Ludlow v. Gill*, 1 D. Chip. 49 ; *Fitzsimmons v. Joslin*, 21 Vt. 129 ; *Drummond v. Couse*, 39 Iowa, 442 ; *Bowden v. Bowden*, 75 Ill. 143 ; *Means v. Feaster*, 4 S. C. 249. And see *Loeschigk v. Bridge*, 42 N. Y. 421 ; *Smith v. Rumsey*, 33 Mich. 183 ; *Barber v. Terrell*, 54 Ga. 146.

§ 714. **Statutes against Fraudulent Conveyances.**—The principal one of these statutes, of English origin, is 13 Eliz. c. 5, and it is common law in our States.<sup>1</sup> But this subject is not quite within the scope of the present volume.

§ 715. **Other Interests of Third Persons.**—A minute examination might bring to view some other interests of third persons in contracts to which they are not parties. But the foregoing are the leading ones; and, at least, are sufficient in illustration of the general doctrine.

§ 716. *The Doctrine of this Chapter restated.*

In general, persons who are not parties to a contract have no concern with it. But privies—such as heirs, executors, grantees, and the like<sup>2</sup>—stand, for many purposes, in the shoes of the original party. And, though one is not a privy,—as, in the case of a creditor, and a conveyance made to defraud him,—he may be injuriously affected by the contract, so that he can even avoid it. But one who has no interest cannot interfere with the contracts of other people. Men may do voluntary acts of benevolence, which, when accepted, the law will confirm. Therefore, if one voluntarily, and without authority, undertakes to confer a benefit on another by acting as his agent, the latter may accept the benefit and ratify the agent's act. All things are then the same, at least between the parties, as though the authority had existed when the contract was made.

<sup>1</sup> See, for a considerable discussion of this subject, 1 Bishop Mar. Women, § 735-761; and, of 27 Eliz. c. 4, see Ib. § 762-774.

<sup>2</sup> "There are several kinds of privies; namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together." Bouv. Law Dict., "Privies." And see Toml. Law Dict., "Privies."

## CHAPTER XXXVIII.

## THE CONFLICT OF LAWS AS TO CONTRACTS.

§ 717, 718. Introduction.

719-736. The Law.

737-743. The Procedure.

744. Doctrine of the Chapter restated.

§ 717. **Nature of the Subject.** — The subject of the conflict of laws is of wide extent in our legal system. But of the doctrines which pertain specially to the law of contracts, the leading ones are simple, and they may be shortly stated.

§ 718. **How the Chapter divided.** — There is, on this topic, a broad distinction between law and procedure. We shall, therefore, consider, I. The Law; II. The Procedure.

I. *The Law.*

§ 719. **Lex Loci — Lex Fori.** — A court, called upon to enforce a contract entered into in another State or country, looks to the law of the place where it was made to determine its validity,<sup>1</sup> — to the law of the locality in which it was meant to be performed to ascertain its meaning,<sup>2</sup> — and to the law under which the tribunal sits for the procedure and whatever else is connected therewith.<sup>3</sup> But these propositions are subject to exceptions and explanations, which,

<sup>1</sup> Evans *v.* Anderson, 78 Ill. 558; Collins Iron Co. *v.* Burkam, 10 Mich. 283; Evans *v.* Kittrell, 33 Ala. 449.

<sup>2</sup> Post, § 731-733.

<sup>3</sup> *Ex parte Melbourn*, Law Rep. 6 Ch. Ap. 64, 69; Trimbey *v.* Vignier, 1 Bing. N. C. 151, 158; post, § 737-743.

together with a more exact statement of the doctrine itself, will now be given.

§ 720. *Valid where made:*—

**Valid everywhere.**—A contract valid by the laws of the State or country in which it is made, is, as a general rule, subject to some exceptions, held to be good also in any other State or country whose courts are called upon to enforce it; even though it would be void had it been entered into, under the same forms, in the latter locality.<sup>1</sup> Thus,—

§ 721. **Usury.**—The rates of interest and the consequences of taking too much vary in the different States. And, if a contract reserving interest on money is good in the State wherein it is made, it will be enforced by the courts of another State in which, had it there been entered into, it would be void for usury.<sup>2</sup> So,—

§ 722. **Written or Oral.**—If, in the State or country where a contract is made, it is good though not in writing, it will be enforced in another State or country by whose statutes such a contract, to be valid, must be written.<sup>3</sup>

§ 723. **Exceptions.**—The exceptions to the rule explained in the last three sections are, “that,” in the language of Fowler, J., “contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; which are against good morals, or against religion, or against public rights; and those opposed to the national policy or national institutions; are deemed nullities

<sup>1</sup> *Greenwood v. Curtis*, 6 Mass. 358; *Carnegie v. Morrison*, 2 Met. 381, 387, 389; *Stebbins v. Leowolf*, 3 *Cush.* 137; *Blanchard v. Russell*, 18 Mass. 1, 4; *In re Murray*, 3 *Bankr. Reg.* 765; *Adams v. Gay*, 19 *Vt.* 358; *Crosby v. Berger*, 3 *Edw. Ch.* 588; *Groves v. Nutt*, 13 *La. An.* 117; *Huey's Appeal*, 1 *Grant, Pa.* 51.

<sup>2</sup> *Philadelphia Loan Co. v. Towner*, 13 *Conn.* 249; *De Wolf v. Johnson*, 10 *Wheat.* 367; *Commercial Bank v. King*, 2 *La. An.* 457; *Robb v. Halsey*, 11 *Sm. & M.* 140; *Davis v. Garr*, 2 *Seld.* 124; *Levy v. Levy*, 28 *Smith, Pa.* 507.

<sup>3</sup> *Scudder v. Union National Bank*, 91 *U. S.* 406; *Forward v. Harris*, 30 *Barb.* 338; *Denny v. Williams*, 5 *Allen*, 1; *Carrington v. Brents*, 1 *McLean*, 167. See post, § 729.

in every country affected by such considerations, though they may be valid by the laws of the place where they are made."<sup>1</sup> And,—

**§ 724. Meant to be performed in another State.**—In a matter of ordinary contract, contrary in some degree to the rule in marriage,<sup>2</sup> no court will allow the laws under which it sits to be intentionally evaded or overridden. If, therefore, parties in one State make a contract which in its nature must be performed in another,—or which, in fact, they mean shall be so performed, as shown by its terms, or by any permissible oral evidence,—the tribunals of the latter locality will not give it effect, unless it is valid as tested by their own domestic laws.<sup>3</sup> Still it should be remembered, that—

**§ 725. Such Contract under Lex Loci.**—Even such a contract cannot be enforced unless it is valid—or, perhaps more accurately, unless it is not invalid—by the law of the place where it is made.<sup>4</sup> But it is not ordinarily invalid there, though contrary to the general law there prevailing.<sup>5</sup> For example,—

**§ 726. Usury.**—If, in State A, it is contrary to law to pay more than six per cent interest, so that a promise to pay more is void, this does not render void a promise, made in State A, to pay more in State B, whose laws permit more.

<sup>1</sup> *Bliss v. Brainard*, 41 N. H. 256, 261. And see 2 Bishop Mar. Women, § 577; *Commonwealth v. Aves*, 18 Pick. 193; *Smith v. Godfrey*, 8 Fost. N. H. 379; *Davis v. Bronson*, 6 Iowa, 410; *Phinney v. Baldwin*, 16 Ill. 108; *Chewning v. Johnson*, 5 La. An. 678; *Greenwood v. Curtis*, 6 Mass. 358, 377; *Windsor v. Jacob*, 2 Tyler, 192.

<sup>2</sup> 1 Bishop Mar. & Div., § 355-389; 2 Bishop Mar. Women, § 579 et seq.

<sup>3</sup> *Lewis v. Headley*, 36 Ill. 433; *Carneal v. Day*, Litt. Sel. Cas. 492; *Maguire v. Pingree*, 30 Maine, 508; *Kanaga v. Taylor*, 7 Ohio State, 134, 142; *Thompson v. Ketcham*, 4 Johns. 285; *McCandlish v. Cruger*, 2 Bay, 377; *Jewell v. Wright*, 30 N. Y. 259; *Touro v. Cassin*, 1 Nott & McC. 173; *Stricker v. Tinkham*, 35 Ga. 176; *Wooten v. Miller*, 7 Sm. & M. 380.

<sup>4</sup> Post, § 561; *Dacosta v. Davis*, 4 Zab. 319.

<sup>5</sup> 2 Bishop Mar. Women, § 581.

Hence such a promise, in a fair transaction, not made in evasion of any law, is good in both States.<sup>1</sup>

§ 727. *Invalid where made:—*

**Invalid everywhere.**—If a contract is really invalid in the State or country where it is made, and not merely so in appearance, it is invalid everywhere. And this rule, unlike its counterpart,<sup>2</sup> does not admit of exceptions.<sup>3</sup> Thus,—

§ 728. **Unstamped**—(**Revenue Laws**).—If, in the country where a written contract is made, it is void for the want of a stamp, it will be void in any other country in whose courts it is sought to be enforced.<sup>4</sup> True, statutes requiring stamps are revenue laws; and the doctrine is sometimes stated broadly, that the courts of one country will not take cognizance of the revenue laws of another.<sup>5</sup> This is not so universally; while yet it is probably established, that, if a contract, entered into in one country to take effect in another, is violative of the revenue laws of the latter, but not otherwise immoral or against public policy, it will be upheld in the former country.<sup>6</sup> As to a promissory note,

<sup>1</sup> *Junction Railroad v. Ashland Bank*, 12 Wal. 226; *Parham v. Pulliam*, 5 Coldw. 497; *Martin v. Martin*, 1 Sm. & M. 176; *Senter v. Bowman*, 5 Heisk. 14, 16; *Duncan v. Helm*, 22 La. An. 418; *Miller v. Tiffany*, 1 Wal. 298; *Pratt v. Adams*, 7 Paige, 615; *Roberts v. McNeely*, 7 Jones, N. C. 506; *Smith v. Muncie National Bank*, 29 Ind. 158; *Arnold v. Potter*, 22 Iowa, 194; *Kennedy v. Knight*, 21 Wis. 340; *Robb v. Halsey*, 11 Sm. & M. 140.

<sup>2</sup> *Ante*, § 720.

<sup>3</sup> *Bliss v. Brainard*, 41 N. H. 256, 261; *Dunscomb v. Bunker*, 2 Met. 8; *Palmer v. Yarrington*, 1 Ohio State, 253, 261; *Shelton v. Marshall*, 16 Texas, 344, 353; *Morris Run Coal Co. v. Barclay Coal Co.*, 18 Smith, Pa. 173; *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133; *Moore v. Clopton*, 22 Ark. 125; *McAllister v. Smith*, 17 Ill. 328; *Titus v. Scantling*, 4 Blackf. 89; *Pearl v. Hansborough*, 9 Humph. 426; *Thompson v. Ketcham*, 8 Johns. 190.

<sup>4</sup> *Alves v. Hodgson*, 7 T. R. 241, 2 Esp. 528; *Bristow v. Sequeville*, 5 Ex ch. 275. See *Wynne v. Jackson*, 2 Russ. 351; *Skinner v. Tinker*, 34 Barb. 333.

<sup>5</sup> *Ivey v. Lalland*, 42 Missis. 444; *Kohn v. The Renaissance*, 5 La. An. 25.

<sup>6</sup> 2 Parsons Con. 5th ed. 754; 2 Chit. Con. 11th Am. ed. 987; *Merchants' Bank v. Spalding*, 5 Seld. 53, 68; *Kohn v. The Renaissance*, *supra*.

executed abroad without a stamp, for which reason it was void where made, Lord Kenyon, C. J., observed: "It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made; and, unless it be good there, it is not obligatory in a court of law here."<sup>1</sup>

Again,—

§ 729. **Void as Verbal.**—If, where an agreement is made, it is void by the statute of frauds because not in writing, it will be also adjudged void in another State, by whose differing statute it would not have been condemned had it been entered into there.<sup>2</sup> And,—

§ 730. **Foreign Endorsement.**—Where a bill of exchange has been endorsed abroad, in a form which would pass the title to the holder if it had been done here, yet which was inadequate by the foreign law, the holder cannot maintain upon it a suit in our courts.<sup>3</sup>

§ 731. *The Interpretation:*—

**By Law of Place of Performance.**—The meaning and operation of every contract are to be determined by the law of the State or country in which, when it was made,<sup>4</sup> it was by its terms,<sup>5</sup> or in the contemplation of the parties, to be performed. This rule applies equally to contracts entered into in a locality other than that of the intended perform-

<sup>1</sup> *Alves v. Hodgson*, *supra*, at p. 243 of 7 T. R.

<sup>2</sup> *Allshouse v. Ramsay*, 6 Whart. 331. See ante, § 728.

<sup>3</sup> *Trimbey v. Vignier*, 1 Bing. N. C. 151, 4 Moore & S. 695, 6 Car. & P. 25. See *Roosa v. Crist*, 17 Ill. 450; *Woods v. Ridley*, 11 Humph. 194; *Hirschfeld v. Smith*, Law Rep. 1 C. P. 340; *Levy v. Levy*, 28 Smith, Pa. 507; *Dundas v. Bowler*, 3 McLean, 397; *Carlisle v. Chambers*, 4 Bush, 268; *Trabue v. Short*, 18 La. An. 257; *Dow v. Rowell*, 12 N. H. 49; *Lee v. Selleck*, 33 N. Y. 615; *Hatcher v. McMorine*, 4 Dev. 122; *King v. Doolittle*, 1 Head, 77; *Stanford v. Pruet*, 27 Ga. 243; *Young v. Harris*, 14 B. Monr. 556.

<sup>4</sup> *Hollomon v. Hollomon*, 12 La. An. 607.

<sup>5</sup> *Goddin v. Shipley*, 7 B. Monr. 575; *Broadhead v. Noyes*, 9 Misso. 56; *Dorsey v. Hardesty*, 9 Misso. 157; *Sherman v. Gassett*, 4 Gilman, 521.

ance,<sup>1</sup> and in the same locality.<sup>2</sup> *Prima facie*, and in the absence of express terms, the performance is, within this rule, to be where the making has been;<sup>3</sup> but, contrary to this, the rules of evidence will, in some circumstances, permit another place to be shown as within the contemplation of the parties, or to be presumed.<sup>4</sup>

**§ 732. Part by One Law, and Part by another.** — A contract, therefore, may be such that it will be interpreted in part by the law of one State and in part by that of another.<sup>5</sup> As, if, being made in one State, it is for the purchase and sale of land in another, — and the money is to be paid in the former State, while the conveyance is necessarily in the latter, — the law of the latter will regulate the question of title, and of the former the question of the effect of a failure of consideration.<sup>6</sup>

**§ 733. Real and Personal, distinguished — Infancy and Majority.** — The title to lands depends on the law of the State in which they are situated,<sup>7</sup> but personal property has no *situs*.<sup>8</sup> Now, in most of our States, girls are infants until twenty-one years old, as at common law; but, in some, their majority is by statute fixed at eighteen.<sup>9</sup> Plainly a girl at eighteen, in a State of the latter sort,

<sup>1</sup> *Cox v. United States*, 6 Pet. 172, 202, 203; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Carnegie v. Morrison*, 2 Met. 381, 389; *Howard v. Branner*, 23 La. An. 369; *Allen v. Bratton*, 47 Missis. 119; *Herschfeld v. Dexel*, 12 Ga. 582; *Boyd v. Ellis*, 11 Iowa, 97.

<sup>2</sup> *Benners v. Clemens*, 8 Smith, Pa. 24; *Golson v. Ebert*, 52 Misso. 260.

<sup>3</sup> *De Sobry v. De Laistre*, 2 Har. & J. 191; *Benners v. Clemens*, *supra*.

<sup>4</sup> See the foregoing cases cited to this section; also *Fisher v. Otis*, 3 Chand. 88; *Brown v. Freeland*, 34 Missis. 181.

<sup>5</sup> *Pomeroy v. Ainsworth*, 22 Barb. 118.

<sup>6</sup> *Glenn v. Thistle*, 23 Missis. 42.

<sup>7</sup> *Brodie v. Barry*, 2 Ves. & B. 127, 131; *Elliott v. Minto*, 6 Madd. 16; *Kling v. Sejour*, 4 La. An. 128; *Clepton v. Booker*, 27 Ark. 482; 2 Bishop Mar. Women, § 575.

<sup>8</sup> *Partee v. Silliman*, 44 Missis. 272.

<sup>9</sup> *Ante*, § 260, 261.

cannot make a valid deed of real property lying in a State of the former sort;<sup>1</sup> yet she can convey her personal effects there.<sup>2</sup> The principle on which this distinction rests, is of wide application, and of prime importance. But, as affecting real estate, there are many contracts which are deemed personal; to be governed, therefore, by the law of the State where made, and to be enforced in any locality.<sup>3</sup>

**§ 734. *Discharge of Contract:*—**

**At Place where made.**—A contract, discharged by the laws of the State or country in which it was made, and where it was meant to be performed, is no longer binding elsewhere.<sup>4</sup> But,—

**§ 735. At another Place.**—Under some circumstances, not all, a discharge in another State or country will not be elsewhere valid.<sup>5</sup>

**§ 736. In General—(Bankruptcy Laws).**—This is one of the questions under the bankruptcy and insolvency laws,—not here to be discussed.<sup>6</sup>

<sup>1</sup> *Barnum v. Barnum*, 42 Md. 251. And see *White v. Howard*, 46 N. Y. 144.

<sup>2</sup> *Huey's Appeal*, 1 Grant, Pa. 51.

<sup>3</sup> *Gardner v. Ogden*, 22 N. Y. 327; *Mott v. Coddington*, 1 Rob. N. Y. 267; *Jackson v. Hanna*, 8 Jones, N. C. 188; *New York v. Dawson*, 2 Johns. Cas. 835; *Low v. Hallett*, 2 Caines, 374; *Henwood v. Cheeseman*, 3 S. & R. 500, 503; *Osmond v. Flournoy*, 34 Ga. 509; *Doulson v. Matthews*, 4 T. R. 503.

<sup>4</sup> *Warder v. Arell*, 2 Wash. Va. 282; *Blanchard v. Russell*, 13 Mass. 1; *Green v. Sarmiento*, Pet. C. C. 74; *Poe v. Duck*, 5 Md. 1; *Le Roy v. Crown-inshield*, 2 Mason, 151.

<sup>5</sup> *Prentiss v. Savage*, 13 Mass. 20; *Ingraham v. Geyer*, 13 Mass. 146; *Tappan v. Poor*, 15 Mass. 419.

<sup>6</sup> See Met. Con. 317 et seq. In *Ellis v. McHenry*, Law Rep. 6 C. P. 228, 234, Bovill, C. J., states the English doctrine to be, that, first, "a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries." Referring to *Burrows v. Jemino*, 2 Stra. 733; *Ballantine v. Golding*, Cooke's Bk. Law, 499; *Potter v. Brown*,

II. *The Procedure.*

§ 737. **Lex Fori.**—Every court has its own course of procedure, to which all litigants must conform, whether the cause of action arose at home or abroad. Hence the rule is universal, that, though the *lex loci*, as it is termed, regulates the right under a contract, for the remedy we look to the *lex fori*; in other words, the proceedings to enforce it are regulated by the laws of the country in which they are carried on.<sup>1</sup> And if, from the peculiar nature of the right, there is no adequate procedure known to the court, the contract will practically be null.<sup>2</sup> To illustrate,—

§ 738. **Specialty or Simple.**—If a contract is in a form to be a specialty in the State where made, but not in the State where its enforcement is sought, or if it is the reverse of this,—as, where the signature is followed by a scroll, which in some States is deemed a seal and in others

5 East, 124; *Odwin v. Forbes*, Buck, 57; *Quitlin v. Moisson*, 1 Knapp, 265, 266, note; *Gardiner v. Houghton*, 2 B. & S. 743; *Phillips v. Eyre*, Law Rep. 6 Q. B. 1, 28. “Secondly, as a general proposition, . . . the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country.” Referring to *Smith v. Buchanan*, 1 East, 6; *Lewis v. Owen*, 4 B. & Ald. 654; *Phillips v. Allan*, 8 B. & C. 477; *Bartley v. Hodges*, 1 B. & S. 375. “But, thirdly, where [as in the case of England and her colonies] the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case.”

<sup>1</sup> *Laird v. Hodges*, 26 Ark. 356; *Alexandria Canal v. Swann*, 5 How. U. S. 83; *Smith v. Atwood*, 3 McLean, 545; *McKissick v. McKissick*, 6 Humph. 75; *Partee v. Silliman*, 44 Missis. 272; *Don v. Lippman*, 5 Cl. & F. 1; *Scoville v. Canfield*, 14 Johns. 388; *Mathuson v. Crawford*, 4 McLean, 540; *Broadhead v. Noyes*, 9 Misso. 56.

<sup>2</sup> 2 Bishop Mar. Women, § 565, 567; *Commonwealth v. Holloway*, 1 S. & R. 392. And see *Lessley v. Phipps*, 49 Missis. 790.

is not,—the suit upon it must be adjusted to the sort of contract which it is by the rules prevailing in the State where the action is brought.<sup>1</sup> Or,—

§ 739. **Arrest.**—If, by the law of the place of the contract, the party to be sued cannot be arrested or imprisoned, or if he has there been freed from his original liability to arrest,—as, under insolvent laws which discharge the person of the debtor but not the debt,—he may be arrested in a suit upon it in another State or country, where arrest is permitted by the general law.<sup>2</sup> Again,—

§ 740. **Corporation or Partners.**—Persons are to be sued as a corporation or as partners according as they are the one or the other by the law of the place of the suit, rather than of the place of the contract.<sup>3</sup> And,—

§ 741. **Interest.**—If interest is adjudged as damages,—not speaking now of interest payable under the contract,—the rate will be governed by the law of the place of the suit.<sup>4</sup> So—

§ 742. **Set-off.**—A set-off, not allowable by the law of the place of the contract, may be introduced in defence when such proceeding accords with the law of the forum.<sup>5</sup> Also—

§ 743. **Limitations.**—The statute of limitations of the State where the suit is carried on, not of the State of the contract, prevails; so that, though the action is barred by lapse of time in the latter locality, it is maintainable in any

<sup>1</sup> *Le Roy v. Beard*, 8 How. U. S. 451; *McClees v. Burt*, 5 Met. 198; *Andrews v. Herriot*, 4 Cow. 508; *Trasher v. Everhart*, 3 Gill & J. 234; *Warren v. Lynch*, 5 Johns. 289; *United States Bank v. Donally*, 8 Pet. 361; *Douglas v. Oldham*, 6 N. H. 150. And see *Watson v. Brewster*, 1 Barr, 381; *Adam v. Kerr*, 1 B. & P. 360.

<sup>2</sup> *Ayres v. Audubon*, 2 Hill, S. C. 601; *Whittemore v. Adams*, 2 Cow. 626; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Imlay v. Ellefsen*, 2 East, 453.

<sup>3</sup> *Liverpool Ins. Co. v. Massachusetts*, 10 Wal. 566; *Taft v. Ward*, 106 Mass. 518. See *Bullock v. Caird*, Law Rep. 10 Q. B. 276.

<sup>4</sup> *Goddard v. Foster*, 17 Wal. 123, 143.

<sup>5</sup> *Davis v. Morton*, 5 Bush, 160, 164.

other State or country by whose laws it is not likewise barred.<sup>1</sup> We have seen, however,<sup>2</sup> that, if the contract has been discharged by the law of the place where made, — an effect not produced by ordinary statutes of limitation,<sup>3</sup> — it cannot be enforced elsewhere.<sup>4</sup>

§ 744. *The Doctrine of this Chapter restated.*

A judicial tribunal should, in the decision of every question, follow the laws prescribed for it by the governmental power under which it sits. But there is a comity of nations, as the term is, by which it has become customary for the various governmental powers to respect one another's laws ; so that, if a contract made in one country is drawn in question in another, the tribunals of the latter will, in the absence of an express statutory inhibition, accept the foreign law as the domestic rule by which the foreign contract is to be measured and its validity determined.<sup>5</sup> But the foreign procedure cannot prevail ; because courts must have their own forms, and it would be both inconvenient and subversive of domestic justice to adopt the foreign forms. Nor will they follow the foreign law in any case where such following would be subversive of the domestic. In the interpretation of a contract, the place of intended performance, whether at home or abroad, will furnish the rule ; because thus the real intent of the parties will be carried into effect.

<sup>1</sup> *British Linen Co. v. Drummond*, 10 B. & C. 903; *Jones v. Jones*, 18 Ala. 248; *Ruggles v. Keeler*, 3 Johns. 261; *Pegram v. Williams*, 4 Rich. 219; *Watson v. Brewster*, 1 Barr, 381. See *Norton v. Sterling*, 15 La. An. 399; *Petchell v. Hopkins*, 19 Iowa, 531; *Hale v. Lawrence*, 1 Zab. 714.

<sup>2</sup> *Ante*, § 568.

<sup>3</sup> *Ante*, § 447.

<sup>4</sup> 2 Parsons Con. 5th ed. 591 and note.

<sup>5</sup> 1 Bishop Mar. & Div. § 867.

## CHAPTER XXXIX.

## COLLATERAL AND SUPPLEMENTAL QUESTIONS.

- § 745-746. General Views and Introduction.
- 747-752. The Element of Time.
- 753-755. Damages liquidated for the Violation.
- 756-759. Penalties in Contracts.
- 760-766. Delivery of the Written Instrument.
- 767. Doctrine of the Chapter restated.

§ 745. **In General.** — The elucidations of the foregoing chapters have brought to view most of the distinctive principles of the law of contracts. But, this department of the law being connected with other departments, not unfrequently questions arise as to the application of the principles at the points of connection. And, in the pure law of contracts, there are further questions as to the application of the principles to particular complications of facts. There also remain a few doctrines of a general nature, not explained in the foregoing chapters. Let us here call to mind some further doctrines ; not attempting, however, absolutely to exhaust the subject.

§ 746. **How the Chapter divided.** — We shall consider, I. The Element of Time in a Contract ; II. Contracts with Liquidated Damages ; that is, specifying what Damages shall be paid for their Violation ; III. Penalties in Contracts ; IV. The Delivery of the Written Instrument.

I. *The Element of Time in a Contract.*

§ 747. *How Time computed:*<sup>1</sup> —

**Year — 29th Feb.** — The English statute of 21 Hen. 3,

<sup>1</sup> See, in connection with the text, Bishop Stat. Crimes, § 105-111.

entitled *De Anno et Die Bissextili*, is common law in our States.<sup>1</sup> It provides, that the 29th day of February, in leap year, "and the day next going before, shall be accounted for one day." Hence, among other consequences, if there could be any doubt under the prior law, a year in a contract, alike in leap year and in other years, is measured by the calendar and varies with it.<sup>2</sup> Still, like other words, this word year may be modified in meaning by the connection in which it is used, and the subject.<sup>3</sup> Coke tells us, that a half year consists of one hundred and eighty-two days, and a quarter year of ninety-one days; "for the odd hours, in legal computation, are rejected."<sup>4</sup>

§ 748. **Month.**—As our law had a beginning before the present calendar, and then the word month meant a lunar month of twenty-eight days,<sup>5</sup> neither in popular acceptation nor in legal interpretation was its meaning at once completely changed. Even at the present day, by the English courts, this word in a contract is taken as a lunar month, where there is no custom, and nothing in the subject, or in the other terms employed, to indicate the contrary.<sup>6</sup> Yet the intention of the parties is accepted as the test of the sort of month;<sup>7</sup> and, in mercantile paper, under the custom of merchants, it is interpreted to be calendar.<sup>8</sup> In our own country, and as to all sorts of contract, a calendar month is generally understood to be meant, unless the contrary appears.<sup>9</sup> As some months are by the calendar longer than

<sup>1</sup> *Swift v. Tousey*, 5 Ind. 196; *Craft v. State Bank*, 7 Ind. 219; *Kohler v. Montgomery*, 17 Ind. 220; *Kilty Rep. Stats.* 208; *Report of Judges*, 3 Binn. 595, 600.

<sup>2</sup> And see *Co. Lit.* 135 *a*; 2 *Inst.* 320; *Engleman v. The State*, 2 Ind. 91; *Anonymous*, 1 *Ld. Raym.* 480.

<sup>3</sup> *Thornton v. Boyd*, 25 *Missis.* 598; *Paris v. Hiram*, 12 *Mass.* 262.

<sup>4</sup> *Co. Lit.* 135.

<sup>5</sup> *Catesby's Case*, 6 *Co. 61*, 62 *a*; *Tullet v. Linfield*, 3 *Bur.* 1455.

<sup>6</sup> *Simpson v. Margitson*, 11 *Q. B.* 23.

<sup>7</sup> *Lang v. Gale*, 1 *M. & S.* 111.

<sup>8</sup> 2 *Chit. Con.* 11th *Am. ed.* 1064.

<sup>9</sup> *Sheets v. Selden*, 2 *Wal.* 177, 190; *Hardin v. Major*, 4 *Bibb*, 104; *Shapley*

others, so they appear also to be in a contract, each particular month being measured by the part of the calendar to which it applies.<sup>1</sup>

§ 749. **Day.**—In general, a day, in our law, consists of twenty-four hours, beginning and ending at midnight.<sup>2</sup> But, in computing time, fractions of a day are, as a rule, disregarded;<sup>3</sup> though they are taken into the account in exceptional instances, where justice requires.<sup>4</sup> But, if a man promises to do a thing in a specified number of days, the day of the promise and the day of the performance are not both counted as full days against him,—one is counted and the other rejected; as, if his promise is, on Monday, to pay money in seven days, payment is due the next Monday.<sup>5</sup> Yet the particular form of words, viewed in connection with the subject to which they relate, may operate to carry the performance a day backward or forward,—a subject upon which there are many distinctions, and some differences of judicial opinion. It would be difficult to derive from the cases a rule other than that the interpretation is to depend on the matter of the contract, the reason of the thing, and the words employed.<sup>6</sup>

<sup>1</sup> *Garey*, 6 S. & R. 539; *Satterwhite v. Burwell*, 6 Jones, N. C. 92; *Leffingwell v. White*, 1 Johns. Cas. 99; *Thomas v. Shoemaker*, 6 Watts & S. 179. As to what is half of a month, see *Grosvenor v. Magill*, 37 Ill. 239.

<sup>2</sup> *Toml. Law Dict.* “Month;” *Titus v. Preston*, 1 Stra. 652; *Watson v. Pears*, 2 Camp. 294; *Webb v. Fairmaner*, 3 M. & W. 478; *Lang v. Gale*, 1 M. & S. 111.

<sup>3</sup> *Ante*, § 261; 2 Bl. Com. 141.

<sup>4</sup> *Anonymous*, 1 Ld. Raym. 480.

<sup>5</sup> *Bishop Stat. Crimes*, § 28, 29, 108, 111; 1 *Saund.* 6th ed. by Wms. 148 d, note; *Tufts v. Carradine*, 3 La. An. 430.

<sup>6</sup> *Bigelow v. Willson*, 1 Pick. 485, 496; *Wiggin v. Peters*, 1 Met. 127, 129; *Homes v. Smith*, 16 Maine, 181, 183; *Henry v. Jones*, 8 Mass. 453; *Buttrick v. Holden*, 8 Cush. 233; *Farwell v. Rogers*, 4 Cush. 460.

<sup>6</sup> *Wiggin v. Peters*, *supra*; *Lester v. Garland*, 15 Ves. 248; *Dakins v. Wagner*, 3 Dowl. P. C. 535; *Brown v. Johnson, Car. & M.* 440; *Pugh v. Leeds, Cowp.* 714; *Isaacs v. Royal Ins. Co.*, *Law Rep.* 5 Ex. 296; *Commercial Steamship Co. v. Boulton*, *Law Rep.* 10 Q. B. 346; *Page v. Weymouth*, 47 Maine, 288; *The State v. Schnierle*, 5 Rich. 299.

§ 750. *Time of the Essence of the Contract or not:—*

**In General.**—An agreement to do a thing on a particular day is broken if, when the day arrives and has passed, it is not done.<sup>1</sup> And, in general, in a court of law, the time within which a contract is to be performed is as much the essence of it as any other part.<sup>2</sup> But, like any other stipulation, that as to time may be waived.<sup>3</sup> To illustrate,—

§ 751. **Election between Two Things.**—When a contract is for the performance of one or the other of two things, the right to elect which of the two it shall be, is with him who is to take the first step.<sup>4</sup> If, therefore, a man who has promised to do one of two things, lets the agreed time pass without making his election by doing either, he is too late to elect, and the other party, who is then to take the first step by enforcing payment, may demand whichever he will.<sup>5</sup> But,—

§ 752. **In Equity.**—In equity, the court will often grant the relief prayed,—as, on a bill to enforce the specific performance of a contract, and in some other cases,—where the applicant has committed a lapse as to time, if his cause is meritorious and he has acted in good faith.<sup>6</sup> Yet, even in equity, time will be regarded as of the essence of the contract, should the parties, by the language they employed, have made it such, or should the justice of the particular case require that it be so treated.<sup>7</sup>

<sup>1</sup> *Ante*, § 700, 702.

<sup>2</sup> *Warren v. Bean*, 6 Wis. 120, 124; *Barrett v. Hard*, 23 La. An. 712; *O'Donnell v. Leeman*, 43 Maine, 158; *Cromwell v. Wilkinson*, 18 Ind. 365; *Hill v. School District*, 17 Maine, 316; *Allen v. Cooper*, 22 Maine, 133.

<sup>3</sup> *Ante*, § 657.

<sup>4</sup> *Layton v. Pearce*, 1 Doug. 15.

<sup>5</sup> *McNitt v. Clark*, 7 Johns. 465; *Nesbitt v. Pearson*, 33 Ala. 668.

<sup>6</sup> 1 *Story Eq.* § 776 et seq.; *Hill v. Fisher*, 34 Maine, 143; *Magoffin v. Holt*, 1 *Duvall*, 95; *Brashier v. Gratz*, 6 *Wheat.* 528; *Hall v. Delaplaine*, 5 *Wis.* 206.

<sup>7</sup> *Shaw v. Turnpike*, 2 *Pa.* 454; *Usher v. Livermore*, 2 *Iowa*, 117; *Young v. Daniels*, 2 *Iowa*, 126; *Sneed v. Wiggins*, 3 *Kelly*, 94; *Liddell v. Sims*, 9 *Sm. & M.* 596; *Tyler v. McCordle*, 9 *Sm. & M.* 230; *Kemp v. Humphreys*, 13 *Ill.*

**II. Contracts with Liquidated Damages; that is, specifying what Damages shall be paid for their Violation.**

**§ 753. In General.** — A contract with liquidated damages is where the parties stipulate, in it, what damages the one who may violate it shall pay to the other.<sup>1</sup> Such a stipulation, if not inconsistent in its terms with the main agreement, and not contrary to the law or its policy, and if free from fraud, will be enforced by the courts; <sup>2</sup> otherwise, not.<sup>3</sup> But —

**§ 754. Distinguished from Penalty.** — It is often a nice question of interpretation whether a particular provision is for liquidated damages or for the sort of penalty to be treated of under our next sub-title. For, as observed by Keating, J., not unfrequently the contracting parties “could not have meant what they have apparently said,” in which case the courts will give effect to their obvious intent; as, “where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable as liquidated damages for a failure to perform one or more of them.” The sum mentioned, therefore, is interpreted in such a case to be, not liquidated damages, but a penalty.<sup>4</sup> Though the very words “liquidated damages” are employed, the courts, when

573; *Kirby v. Harrison*, 2 Ohio State, 326; *Potter v. Tuttle*, 22 Conn. 512; *Stow v. Russell*, 36 Ill. 18.

<sup>1</sup> See 2 Story Eq. Jur. § 1318.

<sup>2</sup> *Lea v. Whitaker*, Law Rep. 8 C. P. 70; *Carter v. Corley*, 23 Ala. 612; *Beale v. Hayes*, 5 Sandf. 640; *Cotheal v. Talmage*, 5 Seld. 551; *Hinton v. Sparkes*, Law Rep. 3 C. P. 161; *Crisdee v. Bolton*, 3 Car. & P. 240; *Hardee v. Howard*, 33 Ga. 533.

<sup>3</sup> *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Sutton v. Howard*, 33 Ga. 536; *Brown v. Maulsby*, 17 Ind 10; *Sessions v. Richmond*, 1 R. I. 298; *Wambaugh v. Bimer*, 25 Ind. 368; *Gower v. Carter*, 3 Iowa, 244; *Bright v. Rowland*, 3 How. Missis. 398.

<sup>4</sup> *Lea v. Whitaker*, Law Rep. 8 C. P. 70, 74; *Chase v. Allen*, 13 Gray, 42; *Gowen v. Gerrish*, 15 Maine, 273; *Higginson v. Weld*, 14 Gray, 165; *Watts v.*

necessary, in carrying into effect the true intent of the parties, will construe them as providing a penalty ;<sup>1</sup> and, on the other hand, a provision with the word "penalty" is sometimes held to mean liquidated damages.<sup>2</sup> The leaning of the tribunals is to the interpretation which makes the provision a penalty ; because thus the sum to be paid may be rendered commensurate with the injury suffered.<sup>3</sup>

**§ 755. In Equity.**—A court of equity will not relieve a party from legal liability, under his contract, to pay liquidated damages ;<sup>4</sup> "provided always," says Story, "the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury."<sup>5</sup> But if the agreement is of a sort of which the equity tribunal enforces specific performance, there is no principle, and probably no authority, for distinguishing the liquidated damages from a penalty, on a bill to enforce such performance ; and it will be enforced, alike in the one case and in the other, where a contrary intent of the parties does not appear in the contract.<sup>6</sup>

### III. *Penalties in Contracts.*

**§ 756. Under the old Common Law.**—Under the old common law, a contract with a penalty, whether under seal or not, could be sued in a court of common law, in an action

Sheppard, 2 Ala. 425; Berry *v.* Wisdom, 3 Ohio State, 241; Carpenter *v.* Lockhart, 1 Ind. 434; Thoroughgood *v.* Walker, 2 Jones, N. C. 15.

<sup>1</sup> Magee *v.* Lavell, Law Rep. 9 C. P. 107; Davis *v.* Freeman, 10 Mich. 188; Moore *v.* Platte, 8 Misso. 467.

<sup>2</sup> Duffy *v.* Shockey, 11 Ind. 70; Watts *v.* Sheppard, 2 Ala. 425. And see Chamberlain *v.* Bagley, 11 N. H. 234; Jackson *v.* Baker, 2 Edw. Ch. 471.

<sup>3</sup> Wallis *v.* Carpenter, 13 Allen, 19, 25. And see Fitzpatrick *v.* Cottingham, 14 Wis. 219.

<sup>4</sup> Westerman *v.* Means, 2 Jones, Pa. 97; Skinner *v.* White, 17 Johns. 357, 369.

<sup>5</sup> 2 Story Eq. Jur. § 1818.

<sup>6</sup> 1 Story Eq. Jur. § 751; Hull *v.* Sturdivant, 46 Maine, 84.

of debt; and, if any one of the promises or covenants was shown to have been broken, the plaintiff could recover of the defendant the full amount of the penalty.<sup>1</sup> But,—

§ 757. **Relief in Equity.**—On application to a court of equity, the party in default might obtain relief on paying the money due or otherwise fulfilling the contract.<sup>2</sup>

§ 758. **English Legislation as Common Law with us—American Legislation.**—Upon this, in 1697, the English statute of 8 & 9 Will. 3, c. 12, § 8, provided, that, on the recovery of judgment for a penal sum in any court of record, enquiry should be made by a jury as to the amount of damages from breaches already suffered, on payment of which the judgment should simply remain a security against further breaches. And, if there were further breaches, the actual damage should, on *scire facias*, be in like manner ascertained.<sup>3</sup> Then, in 1705, Stat. 4 Anne, c. 16, § 13, provided, that, upon an action on a bond with a penalty, for the payment of money, if “the defendant shall bring into the court where the action shall be depending all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond.” The date of these statutes is subsequent to the earliest settlements in this country;<sup>4</sup> still, being highly remedial and beneficial, they were accepted as common law in Maryland<sup>5</sup> and Pennsylvania;<sup>6</sup> and, it is

<sup>1</sup> *Gainsford v. Griffith*, 1 Saund. 51 and notes; *Coates v. Hewit*, 1 Wils. 80; *Thompson v. Hunt*, 3 Lev. 368; *Shaw v. Worcester*, 6 Bing. 385, 389. And see stat. 8 & 9 Will. 3, c. 12, § 8, which provides equally for contracts not under seal as for those which are; showing that, in the opinion of Parliament, there was before the statute no distinction.

<sup>2</sup> 2 Story Eq. Jur. § 1813, 1814; *Peachy v. Somerset*, 1 Stra. 447, 453.

<sup>3</sup> Such is the substance of a verbose provision. And see further as to it, the notes to *Gainsford v. Griffith*, 1 Saund. Wms. ed. 51, 57, et seq.

<sup>4</sup> Bishop First Book, § 56.

<sup>5</sup> *Kilty Rep.* Stats. 244, 246.

<sup>6</sup> *Report of Judges*, 3 Binn. 595, 599, 625.

believed, in nearly<sup>1</sup> all our States. And there has been more or less American legislation to the like effect.<sup>2</sup>

**§ 759. Damages greater than Penalty.**—If damages are suffered beyond the penalty, they will be recoverable or not, according to the nature of the case, and the form of the action. As to this, there are various distinctions, and the cases seem not to be quite harmonious.<sup>3</sup>

#### IV. *The Delivery of the Written Instrument.*

**§ 760. In General.**—We have already seen,<sup>4</sup> that a written instrument, whether under seal or not, takes effect as a contract only on delivery; and that such delivery must be absolute, not as a mere escrow.<sup>5</sup>

**§ 761. Absolute:**—

**The Elements.**—The elements of a delivery are, that the writing must be meant, by the maker, to take immediate effect; and be presumably, or in fact, accepted by the other party.

<sup>1</sup> Not in Massachusetts, *Sevey v. Blacklin*, 2 Mass. 541, or Maine, *Bailey v. Rogers*, 1 Greenl. 186, 190; because of early colonial legislation superseding these English provisions. The Massachusetts court, speaking of another section of this statute of Anne, observes, that "this statute has always been practised upon here." *Bond v. Cutler*, 10 Mass. 419, 421.

<sup>2</sup> See, and as to the form of the judgment, *Campbell v. Pope, Hemp.* 271; *Garnett v. Yoe*, 17 Ala. 74; *Toles v. Cole*, 11 Ill. 562; *Stose v. People*, 25 Ill. 600; *Eggleston v. Buck*, 31 Ill. 254; *Wales v. Bogue*, 31 Ill. 464; *Cameron v. Boyle*, 2 Greene, Iowa, 154; *Whitney v. Slayton*, 40 Maine, 224; *Rubon v. Stephan*, 25 Missis. 253; *Fontaine v. Aresta*, 2 McLean, 127; *Hoy v. Hoy*, 44 Ill. 469; *Blakemore v. Wood*, 3 Sneed, Tenn. 470; *Cairnes v. Knight*, 17 Ohio State, 68; *Trice v. Turrentine*, 18 Ire. 212; *Walcott v. Harris*, 1 R. I. 404; *Warren v. Gordon*, 10 Wis. 499.

<sup>3</sup> *Lyon v. Clark*, 4 Selden, 448; *Arnold v. United States*, 9 Cranch, 104; *Mower v. Kip*, 6 Paige, 88; *Sweem v. Steele*, 5 Iowa, 352, 10 Iowa, 374, 376; *Farrer v. Christy*, 24 Misso. 453; *Carter v. Thorn*, 18 B. Monr. 613; *Baker v. Morris*, 10 Leigh, 284.

<sup>4</sup> *Ante*, § 18, 172, 173.

<sup>5</sup> *Hopper v. Eiland*, 21 Ala. 714; *Carter v. McClintonck*, 29 Misso. 464; *Lansing v. Gaine*, 2 Johns. 300; *Fay v. Richardson*, 7 Pick. 91; *McPherson v. Meek*, 30 Misso. 345; *Freeman v. Peay*, 28 Ark. 439.

§ 762. **The Possession.**—It is possible there should be a valid delivery of an instrument while yet it does not pass out of the hands of the maker; as, if the obligor in a bond, after signing and sealing it, holds it out in his hand and says to the obligee, “Here is your bond, what shall I do with it?” this is a delivery though it is not transferred to the latter’s manual possession. But probably, in such a case, a simultaneous intent of the latter to accept the contract or conveyance must distinctly appear.<sup>1</sup> Thus,—

§ 763. **Acceptance.**—If the writing, after it is signed, is merely left in the hands of a third person, who does not undertake to act as the agent of the party to whom it runs, and this party, by no word or deed, signifies his acceptance of it, there is no delivery.<sup>2</sup> Yet in most cases the law will presume, in the absence of proof to the contrary, that the third person did undertake the office of agent in the particular instance; and that the other party to the instrument,

<sup>1</sup> *Polly v. Vantuyl*, 4 Halst. 153; *Waddell v. Hewitt*, 1 Ire. Eq. 475; *Garnons v. Knight*, 5 B. & C. 671; *Farrar v. Bridges*, 5 Humph. 44; *Harris v. Saunders*, 2 Strob. Eq. 370; *Xenos v. Wickham*, Law Rep. 2 H. L. 296. I do not think it quite certain that all courts will hold to the full proposition of the text; there being, in some, a palpable leaning to the doctrine, that, in order to render the delivery complete, the writing must in some way pass beyond the control of its maker. *Johnson v. Farley*, 45 N. H. 505; *Rivard v. Walker*, 39 Ill. 413; *Cook v. Brown*, 34 N. H. 460. See *Canfield v. Ives*, 18 Pick. 253; *Rutledge v. Montgomery*, 30 Ga. 899. Still, the general doctrine is accepted by all, that the writing need not pass into the manual possession of the party to be benefited by it, and that there may be an adequate delivery by words or by actions. *McLure v. Colclough*, 17 Ala. 89; *Mallett v. Page*, 8 Ind. 364; *Stevens v. Hatch*, 6 Minn. 64; *Warren v. Swett*, 11 Fost. N. H. 332; *Floyd v. Taylor*, 12 Ire. 47; *Dayton v. Newman*, 7 Harris, Pa. 194; *Goodright v. Gregory*, Lofft. 339. There are cases which hold, that a man can make a valid conveyance of his estate by a deed, not only which never passes out of his own hands, but also which never comes to the knowledge of the grantee. *Exton v. Scott*, 6 Sim. 31. *Lloyd v. Bennett*, 8 Car. & P. 124. See *Grugeon v. Gerrard*, 4 Y. & Col. Ex. 119. Such a doctrine is dangerous, and in conflict with some other established principles of the law.

<sup>2</sup> *Johnson v. Farley*, 45 N. H. 505; *Curtis v. Gorman*, 19 Ill. 141; *Carey v. Dennis*, 18 Md. 1; *The State v. Oden*, 2 Har. & J. 108, note.

if it was of a beneficial nature, accepted it. In this way one may take land as a grantee, who does not even know of the existence of the deed, or of the grantor's intent to make the conveyance.<sup>1</sup> And within this principle, the mere putting of a deed or promissory note into the post office, directed to the grantee, is a delivery to him.<sup>2</sup>

§ 764. *Escrow:*—

**What.**—An escrow is a written instrument delivered to a third person, to take effect on the happening of a contingency. The term is generally, in the books, applied to a deed; but it would seem to be equally applicable to other written contracts.<sup>3</sup>

§ 765. **Third Person.**—If the deed is delivered into the manual possession of the grantee, it cannot operate as an escrow, though the parties may both have meant it should. It will take effect, discharged of the condition.<sup>4</sup> But the

<sup>1</sup> In *Johnson v. Farley*, *supra*, Bellows, J., speaking of a deed of land, where the manual delivery was not directly to the grantee but to a third person for him, said: "It must be delivered to such third person as the agent of the grantee, and received by him in that capacity; and then, if the law will, from the beneficial nature of the conveyance, presume the assent of the grantee, the delivery is complete and the estate passes at once. There are cases where, upon this ground, such assent has been presumed. Among them are *Brooks v. Marbury*, 11 Wheat. 78, 96-98; *Tompkins v. Wheeler*, 16 Pet. 106, 118; *Garnons v. Knight*, 5 B. & C. 671; *Grove v. Brien*, 8 How. U. S. 429; *Merrills v. Swift*, 18 Conn. 257; *Woodward v. Camp*, 22 Conn. 457, 461; *Pintard v. Bodle*, 20 Johns. 184. In some of these cases it has been held that sending to the registry, to be recorded, a deed clearly beneficial to the grantee, is a good delivery; but the law is otherwise in New Hampshire, unless the register receive it as agent of the grantee. *Barns v. Hatch*, 3 N. H. 304; *Derry Bank v. Webster*, 44 N. H. 264, 268, and cases cited," p. 509, 510. See, also, *Lloyd v. Bennett*, 8 Car. & P. 124; *Foley v. Howard*, 8 Iowa, 56; *Ward v. Ward*, 2 Hayw. 226; *Burt v. Cassety*, 12 Ala. 784; *Stewart v. Weed*, 11 Ind. 92.

<sup>2</sup> *McKinney v. Rhoads*, 5 Watts, 343; *Mitchell v. Byrne*, 6 Rich. 171; *Kirkman v. Bank of America*, 2 Coldw. 397.

<sup>3</sup> *Worrall v. Munn*, 1 Selden, 229; *Badcock v. Steadman*, 1 Root, 87.

<sup>4</sup> *Miller v. Fletcher*, 27 Grat. 403; *Foley v. Cowgill*, 5 Blackf. 18; *Holford v. Parker*, Hob. 246; *Morice v. Leigh*, 1 Dy. 34 b; *Badcock v. Steadman*, 1 Root, 87; *Jordan v. Pollock*, 14 Ga. 145; *Graves v. Tucker*, 10 Sm. & M. 9; *Worrall v. Munn*, 1 Selden, 229; *Braman v. Bingham*, 26 N. Y. 483; *Gibson*

attorney of the grantee is competent to hold the deed as an escrow.<sup>1</sup>

§ 766. **When takes Effect.**—If the condition on which the deed was delivered transpires, it then becomes absolute, either on delivery of it by the custodian to the grantee,<sup>2</sup> or without,<sup>3</sup> according to the circumstances and the nature of the condition. There are some nice questions as to whether, after the deed has thus been made absolute, it shall operate as from the original delivery, or from the performance of the condition, and second delivery where the latter is necessary. If the grantee dies between the first delivery and the deed becoming absolute, “the deed,” says Coke, “is good; for there was *traditio inchoata* in the life of the parties, *sed postea consummata existens* by the performance of the condition, takes its effect by force of the first delivery, without any new delivery.”<sup>4</sup> There are cases other than of death open to the like construction, but the general rule appears to be that the effect of the deed dates back no further than the second delivery.<sup>5</sup>

§ 767. *The Doctrine of this Chapter restated.*

In this chapter are brought to view some incidents of a contract not necessary to be repeated here. The general

v. Partee, 2 Dev. & Bat. 530; *Hagood v. Harley*, 8 Rich. 325. Yet the person taking under the instrument is by some courts held competent to act as an agent to transmit it to the third person who is to hold it as an escrow. *Brown v. Reynolds*, 5 Sneed, Tenn. 639. And see *Braman v. Bingham*, *supra*.

<sup>1</sup> *Watkins v. Nash*, Law Rep. 20 Eq. 262.

<sup>2</sup> *Gratz v. Catlin*, 2 Johns. 248; *Bushel v. Pasmore*, Holt, 213; *Carter v. Turner*, 5 Sneed, Tenn. 178.

<sup>3</sup> *Perryman's Case*, 5 Co. 83 b; *Peck v. Goodwin*, Kirby, 64.

<sup>4</sup> *Perryman's Case*, 5 Co. 83 b, 84 b.

<sup>5</sup> Williams's note to *Holford v. Parker*, Hob. 246; *Wells v. Ramsbottom*, 6 Taunt. 12; *Price v. Pittsburgh, etc., Railroad*, 34 Ill. 18; *Teneick v. Flagg*, 5 Dutcher, 25; *Russell v. Rowland*, 6 Wend. 666; *Keirsted v. Avery*, 4 Paige, 1.

result is, that every incident has its place in the one harmonious system.

In conclusion of the whole subject, the law of contracts is founded substantially on natural reason and abstract justice. But in it, as in all other departments of our jurisprudence, some technical rules have found a place by virtue of immemorial usage and the adjudications of the courts, and by force of statutes. Nor is it a mere array of decided points; it is a system of doctrines resting in natural and juridical reason, and reducible to rule.

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